H&M International Transportation, Inc. *and* Harry Neilan

UFCW, Local 312 *and* Harry Neilan. Case 22–CA–089596, 22–CA–095095, and 22–CB–106127

March 1, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On June 10, 2015, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, H&M International Transportation, Inc., Jersey City, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Suspending, discharging, or otherwise discriminating against employees because they engage in protected concerted or union activities."

2. Substitute the following for paragraph 2(d).

"(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the suspensions and discharges will not be used against them in any way."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. March 1, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[1] All of the Respondent's exceptions concern the judge's admission into evidence of a surreptitiously-made audio recording of a meeting between employees and Terminal Manager John Nunnery on December 12, 2012. We find that the Respondent's exceptions are without merit. The judge found that Nunnery acquiesced in, and his statements reasonably could have been construed as endorsing, employees' strict adherence to safety rules, including stopping at all rail crossings and complying with the posted speed limit. In so finding, the judge expressly relied not only upon the audio recording, but also upon Nunnery's admissions at the hearing and the credited testimony of other witnesses. Because the judge's factual findings were independently supported by credited testimony, the admission of the audio recording did not prejudice the Respondent. Further, the judge's admission of the recording was consistent with Board precedent. See, e.g., *Local 560, International Brotherhood of Teamsters (County Concrete Corp.)*, 360 NLRB No. 125, slip op. at 4–5 (2014); *Orange County Publication, an Unincorporated Division of Ottoway Newspaper, Inc. d/b/a The Times Herald Record*, 334 NLRB 350, 354 (2001) (citing cases), enfd. 27 Fed. Appx. 64 (2d Cir. 2001). Moreover, the General Counsel met the authentication requirements imposed by the Federal Rules of Evidence by producing testimony that supports a finding that the recording was what the General Counsel claimed it was: a recording of the December 12 meeting. See Fed.R.Evid. 901(a) and (b)(1); see also *U.S. v. Tahn Le*, 542 Fed. Appx. 108, 117 and fn. 8 (3d Cir. 2013) (Government adequately authenticated tape recording as required by Fed.R.Evid. 901(a) by having "a witness with knowledge testify 'that an item is what it is claimed to be.' Fed.R.Evid. 901(b)(1).").

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that *American Directional Boring, Inc., d/b/a ADB Utility Contractors, Inc.*, 353 NLRB 166 (2008), a two-member decision cited by the judge, was subsequently affirmed by a three-member panel at 355 NLRB 1020 (2010).

[3] We shall modify the judge's recommended Order to conform to her unfair labor practice findings, and we shall substitute a new notice to conform to the Order as modified.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for engaging in protected concerted or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Harry Neilan, Alex Ventre, Abraham Gonzalez, and Ernesto Martinez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Harry Neilan, Alex Ventre, Abraham Gonzalez, and Ernesto Martinez whole for any loss of earnings and other benefits resulting from their suspensions and discharges, less any net interim earnings, plus interest.

WE WILL compensate Harry Neilan, Alex Ventre, Abraham Gonzalez, and Ernesto Martinez for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and discharges of Harry Neilan, Alex Ventre, Abraham Gonzalez, and Ernesto Martinez, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

H&M INTERNATIONAL TRANSPORTATION, INC.

The Board's decision can be found at www.nlrb.gov/case/22-CA-089596 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Nancy Slahetka, Esq. and *Robert Mulligan, Esq.,* for the General Counsel.

Russell J. McEwan, Esq. and *David Broderick, Esq. (Littler Mendelson, P.C.),* of Newark, New Jersey, for H&M International Transportation.

Bruce J. Cooper, Esq. (Pitta & Giblin, LLP), of New York, New York, for UFCW Local 312.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW Administrative Law Judge. Based on charges filed by Harry Neilan, an individual, on September 27, 2013, the General Counsel issued an Order Consolidating Cases, First Amended Complaint and Notice of Hearing (the complaint) alleging that H&M International Transportation (H&M or the Employer) engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) and that UFCW Local 312 (Local 312 or the Union) engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.[1] Both H&M and the Union filed answers denying the material allegations of the complaint. On January 23, 2014, counsel for the General Counsel filed and served a Notice of Intent to Amend the complaint, which was granted on the record on January 28. This case was tried before me in Newark, New Jersey, on January 28, 29, and 30, 2014; February 11, 20, and 28, 2014, and March 4 and 6, 2014. After the resolution of certain interlocutory matters, the record was closed by order dated September 30, 2014.

On the entire record, including my observation of the demeanor of the witnesses,[2] and after carefully considering the

[1] By letter dated October 26, 2012, the Regional Director for Region 22 issued a conditional dismissal of the allegation in Case 22–CA–089596 alleging that the reinstatement of certain discipline issued to Antonio Vicente was in retaliation for Harry Neilan's union activities. By letter dated August 29, 2013, the Regional Director revoked the conditional dismissal of that charge and this allegation was incorporated into the instant complaint.

[2] My credibility resolutions herein are based upon context, demeanor, weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Double D. Construction Group, Inc.*, 339 NLRB 303, 305 (2003); *Daikichi Corp. d/b/a Daikichi Sushi*, 335 NLRB 622, 623 (2001). It must be said that virtually every witness who testified herein raised questions about their credibility at certain times. In this regard, it should be noted that on numerous occasions I have credited certain portions of a witness' testimony where other portions have been discredited. *State Plaza, Inc., a wholly owned subsidiary of RB Associates, Inc., d/b/a State Plaza Hotel,* 347 NLRB 755, 755 fn. 2 (2006). Moreover, while every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based

briefs filed by the General Counsel, H&M, and the Union I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times H&M has been a corporation, with an office and place of business in Iselin, New Jersey, and has been engaged in providing railroad terminal services at facilities throughout the United States including its Croxton facility (Croxton) located at 125 County Road, Jersey City, New Jersey, the only facility involved herein. In conducting its operations during the calendar year ending December 31, 2012, H&M derived gross revenues in excess of $50,000 for providing railroad terminal services in interstate commerce under arrangements with and as agent for various common carriers, including Norfolk Southern Railway Company, each of which operates between various States of the United States. H&M admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and it is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

As framed by counsel for the General Counsel in its posthearing brief, the issues presented by this case are as follows: (1) whether H&M violated Section 8(a)(3) and (1) of the Act by suspending and then discharging Harry Neilan, Alex Ventre, Abraham Gonzalez, and Ernesto Martinez; (2) whether H&M violated Section 8(a)(1) of the Act by threatening to discharge Ernesto Martinez and Harry Neilan; (3) whether H&M violated Section 8(a)(1) of the Act by threatening to reinstate discipline to Ernesto Martinez, Scott Watts, Jason Wilson, and Losman Henriquez; (4) whether H&M violated Section 8(a)(3) and (1) of the Act by issuing discipline to Antonio Vicente; and (5) whether the Union violated Section 8(b)(1)(A) of the Act by failing and refusing to process a grievance concerning the suspensions and discharges of Neilan, Ventre, Gonzalez, and Martinez.

Witnesses and Their affiliations

For future reference, a list of the witnesses testifying at the hearing and their respective affiliations may be helpful. The four discharged employees: Neilan, Ventre, Gonzalez, and Martinez all did testify, as did Vicente, the subject of a separate alleged violation of Section 8(a)(3) and (1), who is a current employee. In addition, two other current employees not named in the complaint testified on behalf of counsel for the General Counsel: Richard Barrett and Alfonso DeJesus. The General Counsel examined H&M Terminal Manager John Nunnery and General Manager of Rail Operations Timothy Newcomb pursuant to Rule 611(c), and they also offered testimony to support H&M's case. Also testifying for the Employer were Assistant Terminal Manager Jonathan Bartee, Operations Manager Charles Oliphant, and Norfolk Southern Railroad Intermodal Division Manager Michael Scacco. Union Business Agent William Domini was called to testify for H&M and by the Union to defend the General Counsel's case against the Union in this matter.

Overview of Employer Operations

H&M has a contract with Norfolk Southern Railway Company (NS) to load and unload cargo trains at the NS facility located in Jersey City, New Jersey, which is known as and referred to in the record as the Croxton facility. Employees who load and unload the trains are represented by the Union and have been so for a number of years. The Croxton rail yard is situated on NS property which contains an administrative building used by H&M and another one used by NS, five sets of railroad tracks that run from north to south, a large container storage lot, and an active railroad track over which neither H&M nor NS have control. There is a paved roadway, known as the "main crossing" which separates the north and south portions of the lot and connects the container storage lot to the NS tracks on which H&M's employees most frequently load and unload trains.

Chuck Connors is H&M's owner and chief operating officer. He is supported by Assistant Linda Gillis. Kevin Harrington, the vice president for rail operations, reports to Connors. Timothy Newcomb, the general manager of rail operations, reports to Harrington. Newcomb oversees rail operations at various H&M facilities. Croxton's terminal manager, who is responsible for its day-to-day operations, reports to Newcomb. There are various operations managers, who function as supervisors, who report to the terminal manager. Operations managers direct employees in their work assignments throughout the day.

The substantive work at the Croxton facility is performed by employees known as "hostlers" or "switchers." They use vehicles to move cargo to and from trackside. There are also "loaders" who operate cranes that lift cargo containers and trailers on and off trains. These employees are all represented by Local 312. Neilan was a hostler truckdriver and had served as the Union's shop steward since 1999. Ventre, Gonzalez, Martinez, and Vicente were all hostler truckdrivers as well, and the record reflects that Gonzalez also operated a crane on occasion. Collectively, these employees were the five most senior members of the bargaining unit and considered to be the most experienced employees in the yard.

Prior to September 2012, the terminal manager at Croxton was Ed Burke. In the fall of 2012, a new management team was assigned to the facility charged with, among other things, enforcing safety policies and procedures and ensuring more timely and efficient operations.[3] As part of this transition, John Nunnery replaced Burke. In November 2012, Jonathan Bartee was hired to be trained as the new terminal manager and he assumed that role on January 1, 2013. In October 2012, Newcomb assigned Operations Manager Charles Oliphant to the

on the factors described above. Accordingly, any testimony which is inconsistent with or contrary to my findings should be deemed discredited.

[3] Beginning in 2012, NS had lodged complaints with H&M about the quality of operations at the Croxton yard including late train releases, service failures, accidents, and equipment damage. Later that year, NS told H&M that if conditions did not significantly improve, its contract would be terminated and put out to bid.

Croxton facility. Newcomb did not maintain a constant presence at the Croxton facility. For example, during the period between September 2012 and January 2013, he would be on the premises approximately 2 weeks per month.

In October 2012, NS assigned Scacco, to the Croxton facility. George Martins, among others, reported to him during autumn of 2012.

The Union's Representation of Croxton Employees

The Union has represented H&M's drivers, crane operators, and ground men since at least 1996. Since 2006, business agent William Domini has been the union representative responsible for the facility.

The current collective-bargaining agreement between H&M and the Union is effective from August 1, 2012, through July 31, 2015. Previously, when bargaining for a new contract was due to commence, Domini would ask Neilan to inquire among fellow employees as to who would want to participate in bargaining, and employee representation would generally consist of about four or five bargaining unit members. For prior contracts, Ventre, Gonzalez, and Martinez, as well as Neilan, participated in bargaining.

If employees encountered difficulties at work they would initially contact Neilan, who would attempt to resolve the situation informally. If that proved to be unsuccessful, he would contact Domini, who would address the matter. If those efforts proved to be unsuccessful, the matter would be sent to arbitration or mediation. The record reflects that prior to September 2012, there were few conflicts requiring such intervention. All that changed when the new management entered the scene: Neilan testified that he would call almost daily, that Domini visited the facility between two and three times per week, and that he responded fairly quickly to Neilan's calls.

Overview of Company Operations

Respondent has maintained that Neilan, Ventre, Gonzalez, and Martinez were discharged due to a deliberate work slowdown on December 13, 2012. In this context, a brief overview of the Employer's operations is warranted.

Unit employees work either as crane operators, switcher, or hostler drivers, or ground men. Operators use cranes to move trailers and containers during the loading and unloading of trains, drivers operate hostler trucks to haul trailers or containers between the storage area of the rail yard and the tracks where they are loaded onto the train. Ground men assist drivers by locking or unlocking trailers during the loading and unloading of containers. In the event a driver is not working with a ground man, then the hostler will perform such functions.

The hostlers use speed-regulated (or governed) vehicles to move cargo to and from trackside. Operators log the lifts using a computer system, referred to in the record as "SIMS," at the time they load or unload the trailer or container. During unloading, drivers record the location where they park the trailers or containers using computers located in their trucks. Empty containers which are loaded on rail are recorded by NS employees, known as programmers, and are typically recorded after the loading of the train is complete.

A "lift" is considered the action of loading or unloading a container or trailer on or off a train. Some actions which require multiple moves are counted as one lift. The productivity of employees is measured in terms of "lifts per man hour," or "LPMH" which is not calculated by individual employee but rather by 12-hour shifts, corresponding to the work schedules of operations managers. While the collective-bargaining agreement provides for employee bonuses if the LPMH meets or exceeds an average of 2.7 in any given quarter, that measure has been rarely achieved. A "move" refers to the time it takes a driver to drive from the track to the storage lots, pick up or drop off a load and then return to the track.

Once a train is fully loaded, H&M employees notify their supervisor. H&M management ensures that the train is locked down and then notifies NS that the train is released to the railroad to make preparations for final departure. So-called "release times" are set by NS and H&M managers are instructed accordingly. There are three regularly scheduled outbound trains at Croxton: the 23Z, the 211, and the 21M. There are also regularly scheduled inbound trains: the 24Z, the 20K, the 20W, the 20E, and the 212. Availability is the time an inbound train's load is available to the customer. Generally, H&M is provided 2 hours from the time a train arrives to fully unload it. The decision as to when to begin unloading or loading a train lies within the discretion of H&M management. The record reflects that late release times and availability issues were among the service problems the new management was brought in to correct.

The credible testimony adduced at hearing was to the effect that the ideal (that is, most effective) crew size during the fall of 2012 consisted of five or six drivers for every crane operator, although there were times when fewer drivers were assigned to a particular crew due to any number of circumstances. An H&M manager or supervisor determines the number of employees in each crew and determines which employees will work together in a given crew. Factors other than crew size and composition such as load volume, weather, equipment problems, and accidents will affect productivity and release times. There is a peak season which runs from Thanksgiving through the New Year, at which time the volume of containers to be loaded and unloaded increases.

Enforcement of Safety Rules

Nunnery testified that he was sent to Croxton to among other things, turn things around regarding the observation of and enforcement of safety rules which had been loosely enforced during Burke's tenure. While Burke did enforce the requirement for ground men to wear hardhats and vests he did not require seat belt usage, the utilization of other forms of protective personal equipment (PPE), the prohibition on cell phone usage while operating company vehicles and equipment, and procedures for dealing with vehicles and equipment in need of repair. Domini testified that when new management arrived at Croxton they were unhappy with Burke's lax enforcement of safety rules, the number of accidents, and corresponding equipment damage.

According to Oliphant, the stricter enforcement of safety rules in the fall of 2012 was not well received by the "upper seniority guys." As he testified, "[W]e came in; started changing the rules from what they had been to what they needed to

be" and that it "didn't go over well." Bartee testified that "[t]he more senior the guy the—the more push back there would be." Domini testified that he met with workers often in the fall of 2012 to discuss management's stricter enforcement of safety requirements.

H&M maintains a safety manual known as the "blue book" which was redistributed to Croxton employees in the fall of 2012. In addition, NS maintains its own safety standards, which H&M is obliged to meet or exceed. While Burke was terminal manager, Ventre was assigned to replace him at periodic meetings with NS personnel designed to address safety issues and had done so for about 6 years. Although there is no such official position, Ventre was generally known as H&M's "safety officer."

H&M's safety rules require the use of seat belts, the use of personal protective equipment (PPE) including hardhats, goggles, reflective vests and gloves, a prohibition on cell phone usage while employees are on duty, and promptly reporting vehicles in need of repair. In addition, there are rules and various practices regarding vehicle speed limits and the procedures for traversing crossings which are directly relevant to a consideration of matters herein and bear further some discussion.

The posted speed limit at the Croxton yard is 15 mph, but was more frequently applied to over-the-road carriers who access the site to drop off or pick up trailers. H&M employees working on the site would typically drive at faster speeds to increase productivity. Their trucks are limited (governed) to achieve maximum speeds of 27 mph while empty. A loaded truck will proceed more slowly. None of the employee witnesses herein testified to any instance where a hostler driver received a ticket issued by NS police for speeding.[4] The record as a whole demonstrates that the 15-mph speed limit was, for the most part, unenforced. Scacco admitted this was the case; Gonzalez testified that, although H&M employees were aware of the speed limit, management did not enforce the rule because doing so would reduce productivity. Vicente testified that the workers adhered to the speed limit only when management enforced the rules; generally by advising employees to do so in safety briefings.

The H&M blue book requires employees to stop at all stop signs; use extreme caution at intersections and rail crossings; drive defensively; be alert to other vehicles; and adjust for weather conditions. There are only two upright stop signs that are encountered at the main crossing which are positioned on either side of the active railroad track leading into the container storage lot at the south end of the rail yard. Other stop signs are painted on the ground and do not appear to be maintained. In other words, while they exist, they are faint. Although NS rules appear to require stopping at crossings,[5] the evidence is that in general, drivers did not come to a full stop at these intersections, but proceeded with caution, and that this practice was not only accepted but endorsed by H&M and NS. Sometime in late-September or October 2012, Burke advised employees that due to the new management they should more carefully observe the safety rules, including the stop signs. Neilan, Gonzalez, Martinez, and Vicente did, for a brief period of time, stop at all the crossings, contrary to their usual practice. NS management observed their behavior and discussed the issue with H&M management. Nunnery called a meeting where the employees were advised that they did not have to come to a complete stop at all crossings, but rather use caution as had been customary. From the testimony of both employee and employer witnesses, it appears there was a consensus that coming to a complete stop at all crossings was unnecessary and would slow down productivity.[6]

In addition to redistributing the safety manual to its employees, H&M managers conducted preshift meetings where a number of safety issues and policies were discussed, posted policies in the employee breakroom and conducted spot audits in the yard. For the first several months, no discipline was issued to employees regarding perceived violations of safety rules. It does not appear from the record that Neilan, Ventre, Gonzalez, or Martinez were particularly flagrant violators of the safety rules as any such infractions by them do not appear in spot audits conducted by management during the fall of 2012.

Much testimony at the hearing was adduced relating to the issue of seatbelts, employee resistance to their use and their effect on productivity. Both Neilan and Gonzalez testified that seatbelts would lock causing discomfort and that their use slowed down production. Gonzalez testified that employees did not fasten their seatbelts because they had to get in and out of their trucks so often, perhaps every 40 feet. Ventre complained about his seatbelt and it was replaced. Nunnery acknowledged that employees complained that the seatbelts were too tight when they applied the brakes, that they were dirty, and their use affected productivity.

Chronology of Relevant Events[7]

Negotiations for the 2012–2015 Contract

In the spring of 2012,[8] negotiations for the current collective-bargaining agreement commenced under the auspices of a mediator from the Federal Mediation and Conciliation Service

[4] The NS operations manual provides: "All individuals driving on the intermodal terminal facility must obey posted speed limits. The speed limit for all vehicles on intermodal facilities is 15 mph or less." This manual has a section specifically for hostlers which reiterates this rule. The H&M safety manual also requires that hostler drivers observe posted speed limits.

[5] The General Counsel refers to several memoranda issued in 2012 which purport to show that NS expected H&M employees to stop at all crossings and that H&M was reinforcing that rule in safety briefings with its employees.

[6] The record reflects that employees continued to get "mixed messages" about whether they should stop at the crossings. For example, in February 2013, Barrett received a certificate from an NS manager commenting on his safe driving which included stopping at crossings and observing the speed limit; a safety briefing from July 2013 instructs employees to slow down and stop to check for oncoming trains; several safety briefings from July through September 2013 state that the rule is to stop at the crossings.

[7] The following discusses evidence relied upon by the parties to support or refute both the 8(a)(1) and (3) and 8(b)(1)(A) allegations of the complaint.

[8] All dates hereafter are in 2012, unless otherwise noted.

(FMCS). Neilan, Ventre, and Domini attended on behalf of the Union and Connors and Burke participated for H&M. Connors offered a raise of 25 cents per hour over the course of the contract. In June, there was another meeting at a diner in Secaucus, New Jersey. Neilan told Connors that he had to offer a minimum raise of 50 cents. Connors agreed to that, but no more.

In late-June Connors presented his proposal to the bargaining unit. Domini was unable to attend this meeting. Approximately half of the bargaining unit was present on this occasion. A couple of weeks later another meeting was held in the breakroom on H&M premises. The mediator was present as were Domini, Connors, Burke, and employees Neilan, Ventre, and Julio Esquilin. Connors again offered the 50-cent raise over the course of the contract, with no other changes. The mediator inquired as to whether this was the Employer's last, best, and final offer and Connors replied that it was. Over the objections of Neilan and Ventre, negotiations then ended and Domini conducted a vote. Employees were given the choice as to whether to accept the contract or strike. A majority of employees voted to accept the contract, by a sufficient margin so that the votes of the night employees, who were not present at the time, would not have altered the outcome. Both Neilan and Ventre testified that for prior contracts, there had been more extensive and meaningful negotiations.

Pavel Pimentel's Disciplinary Meeting

On September 6, a meeting was held regarding H&M's suspension of employee Pavel Pimentel due to threats he allegedly made to Operations Manager George Epps. Domini, Neilan, Pimentel, Connors, and Burke were in attendance. Neilan's prior investigation of the incident had failed to uncover evidence of threats. During the meeting, management offered to return Pimentel to work if he admitted to making the threats as alleged by Epps. Neilan testified that he argued with Connors over the demand for Pimentel to admit to making statements he had not made. Management then left the room while the others discussed the matter. According to Neilan, Domini encouraged Pimentel to admit to the threat to allow him to return to work immediately. Domini testified that he did not recall this aspect of the discussion. Pimentel refused and Domini stated that the issue would be submitted to a Federal mediator. Pimentel was allowed to return to work and ultimately, the matter was settled in mid-October by the parties' agreement that Pimentel would receive a written warning on the basis of insubordination to be maintained in his personnel file for 6 months, which was 6 months less than provided for the collective-bargaining agreement.[9]

Enforcement of and Alleged Changes to the "Call Out" Rule

On November 23, 2011, H&M had distributed the following memorandum to its employees:

> Effective immediately, H&M International Transportation would like to clarify our policy regarding the method used to call off an unscheduled absence from work or late arrival:
>
> H&M does NOT consider text messaging an acceptable method of informing your Supervisor that you will not be reporting to work or your late arrival. H&M requires employees to make a phone call to speak to your Supervisor in person but, if your Supervisor is not available when call in a voicemail message will be considered an acceptable alternative means of notification.
>
> This clarification does not alter or change any other aspects of locally distributed call-in procedures for your location for an unscheduled absence or lateness procedure.

Subsequently, on September 13, 2012, Terminal Manager Burke issued the following memorandum:

> CALL-OUT PROCESS
>
> If you are calling off for your scheduled shift you must provide a minimum of (2) two hours notice prior to the scheduled start of the shift.
>
> If you are calling to state that you cannot come to work you must call 201-955-8715 and speak with an Operations Manager. Text or email messages are not an acceptable method of communication when it applies notifying the company that you will not be in for your scheduled shift.
>
> Failure to comply with this procedure will result in progressive discipline.

On September 10, both Neilan and Vicente were scheduled to begin work at 6 a.m. but notified the Employer that they would be out for that day. Neilan provided this notice by sending a text message to Operations Manager Bill Dugan at 5:45 a.m. Vicente called H&M at approximately 4:42 a.m. that morning to notify the Employer of his impending absence. Both employees testified generally that they had called out in the same manner in the past without consequence.

As will be discussed below, both employees received written warnings for their failure to follow company call out procedures, issued by Burke, but administered by new management.

New Management at Croxton

On September 14, Nunnery became Croxton's terminal manager, replacing Burke. Newcomb began to visit the facility more often, usually for 2-week visits. In October, Charles Oliphant was brought in as an operations manager. Newcomb testified that when he arrived he became aware that "from an administrative standpoint we were not doing our job. As managers [we] were not enforcing basic safety policy, nor were we enforcing any type of disciplinary issues as far as attendance, or call off, or anything of that nature, so the place was running ragged because of our lack of managing it."

Newcomb then contacted Domini and explained NS' concerns concerning safety, accidents, and late trains. He told Domini that he planned to enforce work rules and policies as had not been done previously. Domini said that H&M should give employees a 1-week notice of such changes prior to their enforcement. Within the week, Newcomb and Nunnery met

[9] On that same date, other settlements were entered into, as will be discussed in further detail below.

with employees to advise them of management's intentions in this regard.

Discipline for Violations of the Call-Out Policy

On September 14, Newcomb and Nunnery met with Neilan and Vicente to issue written warnings to them based upon their failure to follow call-out procedures on September 10. Neilan was disciplined for calling out less than 2 hours before his shift began and for notifying his supervisor by text message. Vicente was issued the warning for calling out less than 2 hours before his shift began. Both warnings were issued and signed by Burke.

During the meeting where the discipline was administered, Vicente showed Newcomb his phone. Although it showed that he had called later than the the 2-hour limit (at 4:42 a.m.), Newcomb mistakenly assumed that he had called within the allotted time period and rescinded Vicente's discipline.

Neilan's discipline was not withdrawn and he notified Domini, who filed a grievance on Neilan's behalf.[10]

Complaints Regarding the Use of Nonunit Employees and Other Alleged Contract Violations

Neilan became aware that the Employer was using casual employees for work on September 15 and 16, both weekend dates. Typically, H&M would use casual employees if other employees were unavailable for overtime. Neilan testified that bargaining unit employees would be offered the opportunity to perform such work by seniority. If they declined, they would be offered the opportunity again prior to using casuals.[11] On September 14, Neilan was asked on one occasion if he wanted to work overtime on the following day, and he declined. He was not asked again.

Neilan also received reports from fellow employees that a supervisor had performed bargaining unit work by operating equipment, and two workers had been sent to lunch after working only 1 hour. Neilan reported these matters to Domini.

On September 16, Domini sent the following email to Newcomb and others in H&M management entitled "Management doing union work and lunch period":

> Article 4 Section 5 of the union contract states that HM must contact union members when overtime is available. On Saturday 9/16 and Sunday 9/17 a supervisor was operating equipment and to the best of our knowledge the steward who is the most senior man was not contacted, nor anyone else. We are claiming pay for those 2 days for one man. Also it was brought to my attention, 2 workers were sent to lunch after being on the job one hour. The employees' lunch break should be after 5 hours of work as per the law. We are aware of the new management at the Croxton Lift and your intentions to follow the work rules of HM. But we expect you to follow the union contract also. The union requests a copy of the HM work rules and the employees should also be given a copy. I am also requesting a meeting with whoever is running the terminal to discuss the violations that have been going on.

Newcomb responded later that day asserting that to his knowledge there had been, "no management in equipment" and requesting further information. Domini then clarified that a casual had been brought in to do union work without calling one of the unit members first.

Domini then sent the following email to Neilan:

> Harry, I spoke to Tim Newcomb and he stated that on Friday you were asked if you wanted to work overtime this weekend and you replied no, in front of Nunnery and the secretary. He did say the supervisor got into a switcher or machine for 20 minutes and then stepped out of the equipment, as the contract allows. Tim did say if they needed additional help for the shift they would have called the union labor that did not book off for the weekend. He also stated NJ law allows them to send workers to lunch at their discretion, I'm not aware of this. I called our attorney and he is looking into it for me and will advise us. As far as the casual he is a new driver in training that I referred to HM for a job.

Neilan responded as follows:

> Anytime you are asked to work overtime you are asked a day in advance. I don't sign the list that's why I answered no. But I work on an always available basis as the management knows. I haven't signed the overtime list in quite a while because I'm always on call 24/7. As my time card will verify. I work my regular shift and then come back on weekday afternoons and weekend afternoons. Sunday evenings, etc. Whenever I'm needed. As the secretary will verify.
>
> As far as the lunch hour lunch is either between the 4th and 7th hour or it's a work through. This has been a work rule in the contract since 1996.
>
> The contract does not allow management to send union men to lunch and then do their job. We have over 30 men and there is no need to have any management in the equipment.
>
> The contract makes no provision for any casual workers at all. Before using one of them every union man on the roster needs to be called. I'm a dues paying member and will not tolerate being skipped on an overtime call.
>
> What is going on is simply discrimination for me doing the steward job. This is their way to retaliate against me for union activities which is prohibited by law. As we spoke about earlier that supervisor Epps has threatened to change the jobs. Hence you see the schedule not going into effect even after it was bid. Albeit six weeks late. Never has a schedule been bid and then not being put into effect. This a clear violation of the contract.

Neilan sent a further email advising Domini that the casual to which he had been referring was not the new driver in training that Domini had referenced, but rather another employee who had worked as a casual for years.

[10] According to Neilan, this was the first discipline he had received during his tenure.

[11] There is no evidence that this "double dip" procedure is specifically endorsed by the collective-bargaining agreement and no other employee testified to its practice.

The September 17 Meeting

On September 17, representatives of union and management had a meeting. There was little resolution. Neilan reiterated his claim that he was being retaliated against for his activities as shop steward. He specifically mentioned the fact that Vicente's letter had been withdrawn, while his had not. Nunnery testified that Neilan made the point that Vicente had called less than 2 hours prior to the commencement of his shift. Nunnery confirmed the time of Vicente's call and determined that his discipline should be reinstated.

The Reinstatement of Vicente's Written Warning

On September 18, Vicente was called into a meeting with Newcomb and Nunnery and the warning letter regarding his failure to call out in a timely fashion was reissued. According to a recording of this meeting made by Vicente (and corresponding transcript), which I admitted into evidence over Respondent's objection, the following exchange occurred:

> NUNNERY: Okay. One more thing, you know that letter from the other day:
>
> VICENTE: Umm-hum
>
> NUNNERY: Harry come in, we were at a meeting yesterday
>
> VICENTE: Okay
>
> NUNNERY: And he's like, "You're singling me out." I said, Why?" He said, "You gave me a letter but you didn't give [Vicente] a letter. I said, "We gave him a letter." He said, "No."
>
> The policy is you got to call two hours. He said yeah. I said (inaudible). He didn't call out (inaudible). I said, "What do you mean?" I didn't look at the time. I seen you show Tim. You called off and—not within two hours.
>
> VICENTE: Um-Hum
>
> NUNNERY: So, he's like, "You got to—you can't give me a letter and not him a letter." And I was "Like you got a letter for texting, not calling off in the timeframe, which you didn't—wasn't in the timeframe, either but yours was via text. That's the bigger issue. Come on we can—we can make calls and—you can get calls. So he's saying we're harassing him.

Vicente protested that he called out in the same manner as he had in the previous 14 years. In response, Nunnery said, "I think every single thing you guys talked to me about you there (inaudible) no problems. I think you're doing a good job with the new rules we're coming up with . . . I understand the letter's here right now, but as long as you do what we ask we're not going to actually do anything crazy out there man. Simple stuff." Newcomb added that it was "intended to stop the big violators . . . if you're not a big violator it won't never hurt you."

Vicente's discipline was later expunged pursuant to an October 4, 2012 settlement between H&M and the Union.

Shift Changes Announced in October 2012

By contract and past practice employees at Croxton bid on shifts, by seniority, every 6 months. Historically there had been three shifts: 6 a.m.–2 p.m.; 2–10 p.m.; and 10 p.m.–6 a.m. Although the last bid had taken place in August, the bids had not been awarded prior to the new management taking over.

Newcomb determined that the existing shift schedule was ineffective because there was a significant amount of downtime afforded the shift starting at 6 a.m. Newcomb took the position that, under the contract, he had the option to alter the schedules of H&M employees.

At some point in about September, Nunnery and Newcomb informed Neilan that the employees would be asked to rebid their schedules for three new shifts: 11 a.m to 7:30 p.m.; 7:30 p.m. to 4 a.m.; and 10:30 p.m. to 7 a.m. This proposed change affected employees Neilan, Ventre, Gonzalez, and Martinez as well as Vicente and Richard Barrett, who had bid for and were working on the 6 a.m. shift and who had bid on that shift in August. Employees complained about this change which restricted the option for weekends off, for the most part, to those employees who worked the shift beginning at 7:30 p.m. Neilan told Newcomb that the only way he could work the 11 a.m. shift was to take away a slot with weekends off from someone who needed it.

Neilan reported the announced schedule change to Domini, who stated that he would submit the matter to be mediation.

The Initial Unfair Labor Practice Charge Filed by Neilan

On September 19, 2012, Neilan filed a charge with the National Labor Relations Board (the Board) alleging that H&M had violated Section 8(a)(3) and (1) of the Act by discriminating against him in retaliation for his union activities and by advising other employees that they were being disciplined on account of Neilan's union activities. By letter dated October 26, 2012, the Regional Director for Region 22 conditionally dismissed the allegation that H&M reinstated Vicente's discipline in retaliation for Neilan's union activities.[12] The remaining allegations of the charge were dismissed in their entirety.

Mid-September Meeting with the Union

Neilan arranged for an offsite meeting with Domini which was also attended by Ventre, Gonzalez, Martinez, and Vicente. The workers lodged complaints about, among other things, the impending schedule changes. Domini consulted the Union's attorney and advised the group that these issues would be discussed at an upcoming mediation session. Eventually, management's decision to change the schedules was grieved and deemed to be appropriate by an arbitrator.

Neilan and Gonzalez Allegedly Skipped Over for Weekend Overtime

Operations Manager Craig Smith asked Neilan if he was interested in overtime work on Saturday, September 22. Neilan declined, but stated that he told Smith he should give him a call if he was "in the bag." Smith did not contact Neilan to work. Gonzalez, the second most senior employee working at the time was not asked to work. Neilan believed that a worker from another terminal was brought in and reported this matter to Domini. On October 3, a mediation session was held and a

[12] This allegation was subsequently reinstated following a merit determination in the instant case warranting the issuance of the complaint.

settlement agreement was entered into by which Neilan was compensated for 8 hours and Gonzales for 4 hours of overtime pay to compensate for lost time during the weekend of September 22, 2012.

Alteration of Shift Start Times

On September 24, Newcomb notified employees on the 6 a.m. shift to report to work on the following day at 9:30 a.m. due to the anticipated late arrival of the 24Z train. The notice distributed to employees references a particular contract provision, which Neilan did not believe was applicable to the situation at hand.[13] Neilan then contacted Newcomb, who maintained that since the provision was in the contract, he would use it. Neilan reported the matter to Domini. As it happened, it appears from the record that almost everyone on the 6 a.m. shift was called and instructed to report at the usual hour.

On the following morning, September 25, Neilan was called to a meeting with Domini, Newcomb, and Nunnery at which various issues were discussed, including the flextime provisions of the contract. As Neilan testified, at one point Newcomb asked him if he wanted the Company to go out of business. Neilan responded he just wanted the Company to follow the contract. Newcomb then asked Neilan if he was there for the men or just for himself. Neilan replied he was there for the men. As Neilan testified, Newcomb then stated, "Well, you know Harry, I don't have a problem with you, it's Chuck that has a problem with you."

Call for Overtime on September 27

On the morning of September 27, Neilan was asked whether he wanted to work overtime that day. He declined but stated that if management was "in the bag" they should give him a call. At around 4:30 p.m. that day, Nunnery called Neilan and asked him to return to work to help out. Neilan worked from about 6 to 9:30 p.m. on the 23Z train.

Gonzalez Complains About Safety

Sometime during the summer of 2012 a new bridge was constructed over the west end of tracks A and B. Gonzalez testified that the bridge lacked sufficient space for workers to stand, creating the possibility they could fall into the river while working in that area. Gonzalez asserts that he lodged numerous complaints about this issue to H&M managers, including Nunnery. H&M replied that the bridge was on NS' property; thus, they had the responsibility for it. Gonzalez then spoke with the yardmaster, an NS employee, and an additional walkway was added to the bridge.

October Mediation Session with the FMCS

As has been referred to above, on October 3, a mediation session was held in Scacco's office with an FMCS mediator. Also in attendance were Neilan, Ventre, Richard Gonzalez, Domini, Connors, Nunnery, Gillis, and Epps. Five issues were resolved at this meeting: (1) Neilan was paid 8 hours of overtime to compensate for lost overtime on September 22; (2) Abraham Gonzalez was paid 4 hours of overtime to compensate for lost overtime on September 22; (3) Vicente's September 10 warning was withdrawn; (4) Neilan's September 10 warning was withdrawn; and (5) there was a settlement regarding the Pavel Pimentel issue, which is described in detail above. The parties additionally discussed the proposed schedule changes, but the Company was insistent on those changes. Domini advised Neilan that he would submit this matter to arbitration.

Newcomb Speaks with Morning-Shift employees

In early October, Newcomb gathered the morning shift workers for a short meeting at the west end of track A. Newcomb testified that the purpose of the meeting was to encourage teamwork and instruct the crew to change the placement of containers, so as to increase productivity. Gonzalez, who was present at this meeting, testified that Newcomb said that if anyone tried to prevent him from getting done what he wanted to get done, he could terminate not only that individual, but a group of workers, so that he would not be accused of singling anyone out. Newcomb denied making that statement and I note that no other employee then working on the morning shift, which at that time included Neilan, Barrett, Martinez, Vicente, and Ventre, all of whom testified herein, corroborated that Newcomb had made such a threat.

The Posting of Work Rules

On October 5, H&M posted a series of memoranda in the employees' breakroom with an effective date of October 8. These memoranda addressed the following issues: Flextime (changes in work hours due to train schedules); Hold-Over (the requirement that employees work overtime when necessary and placing certain restrictions on that practice); Rest Period (providing for two breaks of 15 minutes each and a 30 minute lunchbreak); holiday bid procedures and overtime pay procedures. On October 11, another memorandum was posted regarding procedures for requesting vacation time and floating days, to become effective October 14. As Neilan testified, the holiday bid and overtime pay policies represented the current practice; the flextime and rest period policies restated provisions in the collective-bargaining agreement although they had not been previously enforced and the hold over and scheduling of vacation leave policies were new. Neilan asserts that he did not receive copies of these policies although they indicate that he did.

Employees were asked to sign an acknowledgement that they had received, read, and understood each policy. Nunnery showed the policies to Neilan on October 24. He signed for all of the rules except for the hold over rule which he maintained was not part of the contract. Gonzalez was approached by Oliphant in the breakroom and asked to sign the acknowledgement sheet. Gonzalez then retrieved a copy of the collective-bargaining agreement from his locker and pointed out what he viewed as contradictions to that document. As Gonzalez testified, Oliphant became angry and left the breakroom. Later that afternoon, when Gonzalez was working on a crane, Newcomb approached him and stated that he wanted to discuss Gonzalez' earlier discussion with Oliphant. Gonzalez told Newcomb the

[13] Art. 4, sec. D3 of the contract provides that start times will be posted daily before the end of each shift and that management has the right to change hours of work due to changes in train schedules. Neilan took the position that this so-called "flex-time" provision had been intended to be operative only until the operation became stable in 1996, which was the initial year of operation.

rules changed the provisions of the contract and such changes had to be negotiated with the Union. Newcomb then called over Neilan and Ventre. Gonzalez testified that Newcomb stated that he needed the changes to make things run better and needed the employees' help to accomplish this. They said they would try to work with him as long as he did not make changes that had already been negotiated and in the contract. According to Ventre, Newcomb asked, "[W]hy [do] you keep fighting?"

Ventre met with Oliphant in the yard. Ventre asked Oliphant if he was trying to negotiate a new contract. Ventre refused to sign the hold over policy but signed an acknowledgement of the rest.[14]

Implementation of Changes in Employees' Work Schedule and Weekend Overtime Hours

On October 9, H&M posted the new shift schedule which became effective on October 15. Neilan, Martinez, and Vicente worked the 7 p.m. shift and Ventre, Gonzalez, and Barrett worked the 11 a.m. shift.

After the implementation of this new schedule, Nunnery told Neilan that he was going to require workers scheduled to work from 11 a.m. to 7:30 p.m. on Saturday and Sunday to come in at 7 a.m. and pay them 4 hours of overtime. Neilan told Nunnery that overtime should be bid out and awarded by seniority. Nunnery agreed, but stated that any worker who came in to work overtime at 7 a.m. would have to leave at 11 a.m. when the regular shift started. Previously, overtime shifts had lasted for 8 hours, rather than 4.

The October 24 Union Meeting with Management

At about 7 p.m. on October 24, a meeting was held in the breakroom with Domini, Neilan, Ventre, Gonzalez, and Martinez in attendance for the Union and Newcomb, Nunnery, and Donovan in attendance for management. There was a document drafted as a result entitled "Understanding of Shift Hours" which was posted in the breakroom. Topics covered included duration of shifts, rules regarding lunchbreaks, early departure, overtime pay for working through lunch, notification of management if leaving the work area, and a commitment on the part of labor and management to work together and communicate with each other should unexpected circumstances arise.

Worker Dissatisfaction with the New Policies and Work Rules

According to Domini, Neilan, and other workers communicated their unhappiness about the enforcement of the new policies and work rules frequently. He spoke with Neilan frequently, sometimes on multiple occasions in 1 day. Worker complaints resulted in discussions with Nunnery, Newcomb, and Connors several times a week and Neilan was generally present at these meetings. Nunnery corroborated this by testifying that any time he came up with a memo or policy, Domini had to come down and he would be obliged to hold a meeting. According to Nunnery, between September and December, there were about 15 meetings, and workers were also present. Such meetings could become "heated" due to worker dissatisfaction with management's changes.

The Broken Sink and Toilet

Workers generally used a restroom situated in a separate trailer located near the trailer which housed the breakroom. In about November, the toilet broke (the sink had apparently broken earlier in the autumn) and employees were obliged to use a bathroom located further away. Employees complained to Gonzalez about this matter and after broaching the subject with management, Gonzalez told Domini he was going to call the health department. Domini said he would take care of the matter. Domini testified that he "told John Nunnery that Abe called me; and I told him to fix the fuckin' bathroom so I don't have to deal with the Health Department." The toilet was fixed the next day. Neilan testified that on the following day, Nunnery said to him, "Oh Abe didn't have to go and call Bill on me . . . I don't like to be threatened."

Overtime Disputes

On Saturday, December 1, Neilan worked an overtime shift from 7 to 11 a.m. During this shift, Oliphant asked Neilan to work past 11 a.m. and he declined. When Neilan went to punch out he discovered the timecards were missing. Neilan then called Nunnery to advise him he could not punch out and Nunnery told him he needed him to stay and Neilan again declined. As Neilan testified, Nunnery then stated, "Well, that's going to be the end of those four-hour shifts." Neilan told him to put it in writing.

Nunnery testified that the operations manager informed him that Neilan and some other employees said they were going to leave at the end of their 4-hour shifts. Nunnery said he called Neilan, but Neilan had already left the premises. Nunnery then went to speak with Martinez and told him that he needed for him to stay longer than 4 hours, and Martinez agreed. Martinez testified that Nunnery told him that he and Neilan had been arguing about overtime and the men not wanting to stick around. Martinez replied that the 4-hour rule had already been posted. According to Martinez, Nunnery complained that Neilan had embarrassed him on the phone because Newcomb had overheard the conversation and that he tried to work with Harry and that Neilan "did not want to see [his] bad side." Nunnery denied making this comment. According to Martinez, he replied, "[T]hat's the way in the contract—it's a four hour shift; we're all union here—we stick together."

On Sunday, December 2, Neilan worked another overtime shift from 7 to 11 a.m. Oliphant asked him to stay on. Neilan replied that he wanted to go to church first and then would return. He later worked from about 3 to 9 p.m.

As Neilan testified, at about 7 p.m. that evening some employees who had been working since the morning were complaining over the radio that they wanted to go home because they had already worked for 12 hours. Newcomb came over the

[14] Domini testified that a number of these policies had been in existence but unenforced under Burke and that some were new—specifically the new rule requiring employees to work up to 8 hours after their normal shift. The Union resisted this new rule due to safety considerations. The change in work schedules resulted in a grievance which went to arbitration in January 2013, and the arbitrator upheld the Company's right to change the schedules. Domini further testified that although the Company had used casual employees in the past, it had not been an issue until September 2012. He addressed this issue with management and, as a result, casuals are no longer used.

radio and said, "Nobody's going anywhere. You guys think you're a bunch of tough guys. Wait 'til tomorrow. I'm going to do what I have to do." Newcomb claimed the right to hold the men for as long as 16 hours. At 7:30 p.m. Neilan attended a meeting with all the men working at the time as well as Oliphant, Newcomb, and Nunnery. According to Neilan, Newcomb stated that he would not punish anyone who did not stay and that "we'll just lose the contract." Newcomb then asked the men to talk it over, and he would return in 15 minutes. Nunnery testified that he and Newcomb told employees at this meeting that, "We're done fighting with you. We're not going to argue with you. We have a job to cover here. If we don't cover the job, we gotta tell the Railroad we just didn't cover the job. We're going to let you guys decide what you're going to do." The workers deliberated among themselves and decided to stay on.[15] According to Nunnery, he received a text message from Neilan on the following day to the effect that "you get more with honey than with vinegar. This is what happens when you treat the guys nice. I hope you enjoy the game."

Contact with the Union

On December 3, Neilan called Domini to advise him about the events of the prior evening and he came down to the facility at noon that day. Neilan was summoned to attend a meeting with Newcomb, Nunnery, and Domini. Newcomb and Nunnery took the position that the Company could hold employees for shifts lasting as long as 16 hours, but Nunnery acknowledged that such a policy was not a written one.

Neilan lodged an objection to these assertions and in response, Newcomb said that Neilan would be responsible for booking manpower. Neilan replied that was not his job. According to Neilan, Newcomb stated that Neilan was "the problem down there" and he objected "to everything that management tries to do." Newcomb and Nunnery both denied that comment; however, Nunnery acknowledged that "the gist of the conversation was, every single thing that we were trying to do in there was kicked back against or met with resistance, or it was always a battle. Nothing ever went—nothing ever went easy, no matter what it was."

Additional Schedule Changes

On December 10, the Company solicited bids for a new schedule, which differed from those implemented in October. Neilan was not asked to participate in this process, which he asserted was a departure from past practice. Neilan, Ventre, Gonzalez, Martinez, Barrett, and Vicente, among others, all bid onto the 11 a.m. to 7:30 p.m. shift. It appears from the record that the new shifts went into effect shortly thereafter.

The Senior Men Meet with Scacco

Scacco had come to the facility in October 2012.[16] According to Scacco, Neilan had approached him in the yard, introduced himself and said he would like to get to know him. Scacco agreed to set something up.

On December 11, during their shift, Neilan, Gonzalez, Ventre, Martinez, and Barrett were called by Newcomb into a meeting with Scacco which took place in Scacco's office. No one from H&M or the Union was present. Scacco testified that, due to their seniority, the men could be good leaders for the others, and he informed them of this fact.

At the meeting, which lasted for approximately 45 minutes to 1 hour, the men raised issues such as work schedules and seatbelt rules. Scacco brought up issues such as production and efficiency. He stressed the importance of the peak season and told the men that it was the industry standard to use seatbelts and that the issue of work schedules would be tabled until January. There was some discussion of getting the overnight trains, the 211 and 21M, out on time because they were priority trains.

Neilan testified that Scacco said he had been a union man and when he had worked in Harrisburg there had been problems with the men throwing their radios into the Susquehanna River and he wanted to ensure that there would not be similar problems at Croxton.

As Neilan testified, Scacco also said if there were problems, the men would be barred and not coming back with another company. Gonzalez recalled that Scacco told them that if the union men gave him a hard time, "[H]e would have ways of persuading them into working better with us" and that "[m]aybe he could give them a couple of weeks off to think about it." Ventre testified that Scacco said, "[d]on't let issues with the Union interfere with your livelihood." Ventre testified that Scacco brought up a strike at the Hostess facility, the fact that the Company had gone out of business and that Scacco said that the employees had lost their jobs because the union had not settled the contract. Scacco testified that he told the men that he had been in a union for many years and admits to discussing the Hostess strike, with them "as a current event, so to speak."

Barrett testified that Scacco said that NS was not going to kick H&M out. Scacco told the men that he was asking for advice; there had been a couple of late trains the prior week and asked whether the men could help the night crew. The trains discussed were the 211 and the 21M. He further testified that he did not recall what the employees discussed with Scacco at the meeting; only what Scacco told them.

Both Neilan and Ventre testified that Scacco made a comment to the effect that Connors did not like Neilan. Scacco denied discussing Connors or H&M management with the men.

The record corroborates Scacco's contention that late releases were, at that time, a concern for NS, and that H&M was aware of this problem. A December 11 email from NS to H&M directed, with regard to late releases, that "[i]f you are in fact late state it and why." Newcomb responded by sending an email to Croxton H&M management stating that "[i]f we do not release on time, we must state EXACTLY why."

[15] Nunnery testified that his position was that in emergency situations, the Company can require employees to work up to 16 hours.

[16] According to Scacco, an industry veteran, when he was assigned to Croxton the facility was experiencing service problems, late trains, damaged equipment, and improper loading and unloading. In November 2012, a meeting was held with H&M managers where these issues were discussed and H&M was informed that they were in danger of losing the contract.

The December 12 Safety Meeting

Nunnery testified that after he arrived at the facility in September, the employees were generally, although not entirely, cooperative in complying with company safety rules. In December, Nunnery noticed a backslide, particularly with the use of seatbelts. In a spot audit conducted on December 7, Nunnery cited four employees for safety violations such as failure to use seatbelts and failure to wear personal protective equipment such as hardhats, glasses, and vests. Although Nunnery, to this point, had refrained from issuing discipline, it was decided that at this time it was appropriate to do so. Accordingly, Nunnery prepared warning notices for four employees: Martinez, Scott Watts, Jason Wilson, and Losman Henriquez. According to Bartee, the discipline Nunnery was issuing was part of the Employer's progressive discipline system: i.e., verbal warnings—documented, written warnings, and termination after multiple occurrences. Nunnery similarly confirmed the existence of a progressive discipline system when questioned by counsel for the General Counsel.

On the morning of December 12, Nunnery informed Neilan that he wanted to see him at 7:30 p.m. at the end of his shift because the Company intended to issue disciplinary actions to those four individuals found to have failed to follow safety protocols on December 7. After the day shift ended and the evening shift was arriving, Nunnery and Bartee met with Neilan and the affected bargaining unit members in the employee breakroom. A number of other bargaining unit members were present, as they filtered in and out at either the beginning or end of their shifts. There were about 12 to 15 employees present at what is referred to in the record as the "safety meeting," including Neilan, Gonzalez, Ventre, Martinez, Scott Watts, Barrett, and James Roper. There was also a plan to administer discipline to employee James Roper, separately, after the meeting concluded. As it happens, Roper secretly recorded both the safety meeting and the meeting at which his discipline was discussed.[17]

Generally, the recording of the meeting reflects discussion of a wide range of topics relating primarily to H&M's safety rules and protocols, the employees' dissatisfaction and disagreement with the necessity for various rules, their impression that strict enforcement of the rules would tend to slow production, and the Employer's concern with safety, rising insurance costs, productivity, and their frustration with the fact that employees were failing to follow instructions regarding safety at the workplace. Because the discussions which took place at this meeting are a central element to the General Counsel's prima facie case, and Respondent has so vigorously objected, not only to the recording's admissibility, but to its completeness and relevance and to General Counsel's characterization of what occurred there, I find that a more specific account of what occurred, as reflected in the recording, is warranted.

Nunnery began the meeting by telling employees that he had been more than patient, and: "we've asked, we've begged, we've done everything we can to say, 'Guys, follow the rules.'" He went on to say that when he conducted spot inspection the other night, the men were not following the rules; in particular that the men were not wearing PPE. He noted that he had not written anyone up in the 3 months he had been at the facility and that he "was looking like an asshole" because of a lack of compliance. Nunnery further stated that he did not "agree" with the seatbelts; nor did he like hardhats but it wasn't his choice. He also said he did not like the speed limit out there on the road, but he had to follow it.

Nunnery then addressed particular employees who had been seen either not wearing PPE or using their seatbelts. Then the subject of stopping at crossings ensued, as follows:

> HARRY [NEILAN]: You said we were working under common sense. Remember we sat down in the office and you said, "listen Harry, we're not going to write you up for any nonsense—
>
> (background noise)
>
> JOHN [NUNNERY]: Right, just follow the rules.
>
> HARRY: Well, you know what, if we followed all the rules, John, hardly anything would get done, Brother.
>
> JOHN: I understand
>
> HARRY: If we stopped at every crossing—
>
> JOHN: Listen
>
> HARRY: —you wouldn't get anything done here, man
>
> JOHN: Have I wrote anybody up for stopping at every crossing?
>
> HARRY: No, but what you did tell—but what—you don't want us to stop at every crossing.
>
> JOHN: Right.
>
> HARRY: When you catch us, we're doing something that you feel that you could hurt us with, you do it.
>
> JOHN: Harry—Harry then stop at every crossing?
>
> HARRY: All right. Fine, I can do that.
>
> JOHN: Okay
>
> HARRY: Okay. You want to work under—you know, you want to work that way, we'll work that way. Don't matter to me.
>
> JOHN: Listen guys, I cannot allow you to be out there without following the rules. If you got to stop at every crossing, I'm telling you, I'm not writing anybody up for stopping at crossings. If you slow down at locked tracks, that's what I said common sense is.

There ensued a discussion about whether it was necessary to stop at the crossings, and Nunnery questioned why it would be necessary to stop at locked tracks. Neilan maintained that was what H&M's blue book said and Nunnery disputed that fact.

[17] Roper did not testify herein. As Neilan testified, Roper provided the full recording to him and he, in turn, gave it to the Region during the course of the investigation of these matters. Respondent objected to the admission of the recording of this meeting on various factual and legal grounds. For the reasons discussed below, I find that the recording and transcript are properly admissible and constitute reliable evidence of what occurred that evening in the safety meeting, and note that it is generally corroborated in significant part by the testimony of witnesses who stated that they did not listen to the tape. The portion of Roper's tape which recorded the second meeting, pertaining to discipline administered to him, was not made a part of this record. However, neither Nunnery nor Bartee, both of whom attended this second meeting, offered testimony that any discussion there would serve to retract, amend or contradict the assertions made by H&M management in the so-called safety meeting.

Ventre pointed out that (some years previously) Losman had been hit by a train, and employees were required to sign paperwork stating they would stop at every crossing. Nunnery then stated, "I'm not writing anybody up for stopping at crossings, I've already—that's what we are working under, common sense. You want to stop at everything, stop at everything.

Nunnery then referred to the fact that for the past 3 months he had "begged employees" to use their hard hats, seatbelts and glasses. Neilan replied that the men were just trying to save time. Nunnery stated: "Listen guys, I want us to be efficient. I want us to be, but if it's—if that's the—the price I have to pay for us following the rules, let's following the rules, man." Neilan stated that it was important to get the job done safely and efficiently and that was what the railroad wanted.

The discussion continued about working with common sense, the importance of following safety rules, and how some of the rules impeded productivity and seemed unnecessary. Neilan said that some of the safety rules were nonsense and would slow operations down. Nunnery said he agreed with him but, "what do you want me to do?" Neilan replied, "What I would like you to do is not give these guys letters for it. You come and talk to them." Nunnery said that he had been talking to the men for 3 months; how much more talking could he do?

A discussion of problems with the seatbelts ensued and Ventre stated that he had been receiving complaints that the seatbelts were hurting people and did not know whether management had received similar complaints. Bartee replied that he had not and that the belts were designed to lock up when a driver hit the brakes. Nunnery acknowledged there were problems with them. Gonzalez complained that management had focused on safety for a while and then, a month later, complained that productivity had dropped. Nunnery then again stated his frustration with the employees' failure to follow safety rules; asking Ventre, Gonzalez, and another employee identified as "James" specifically how many times he had addressed them on this issue. There was another discussion of seatbelts with various employees complaining about their operation and the fact they slowed them down.[18]

The discussion then turned again to the issue of stopping at crossings, and that the railroad wanted the H&M employees to stop and do 15 miles per hour. Nunnery responded, "Well, let's do it." He then reiterated, "Listen, roll 15, stop at the crossings. Follow the rules." He later stated:

> The productivity number I used to push a whole bunch, that productivity number is shit because everything you pay for accidents, injuries, Workman's Comp, you don't see it . . . I have $180,000 in damages, so what did you accomplish? I would rather us go slow, take our time, run a regular– Because, listen, the productivity numbers when you guys were stopping at the crossings weren't bad. They were actually decent. So listen, stop at the crossings. That's your guys' job. If we don't get the job done, you guys get froze out of here, not me.

There was more discussion and accompanying complaints about the seatbelt requirement from various employees; specifically complaints that their use would slow production. Nunnery responded, "[s]low it down, slow it down." Nunnery assured employees that supervisors would also be written up for violations of H&M's safety rules.

Ventre and Gonzalez then both proposed that the employees commit to following the safety rules in exchange for Nunnery withdrawing the disciplinary notices. Ventre said, "Throw this shit out. Tomorrow we go by the rules, all right? Makes you happy, I guarantee—." Gonzalez said, "We'll kick their ass ourselves" and promised Nunnery that they would tell everybody. Nunnery then said, "Listen, do you that for me, I'll throw them out" and Ventre replied, "hardhats and the seatbelt, not a problem" "Neilan also said he would tell everyone to go by the safety rules: "They want you to do it, you do it. That's it" and said he would tell the guys tomorrow.

Then the following exchange took place:

> NUNNERY: I can't tell you to not stop at a crossing.
> GONZALEZ: All right, that's fine.
> NUNNERY: Before we had this common sense thing going on.
> GONZALEZ: So that's fine

After some more discussion, the meeting ended.

Neilan testified, in apparent contradiction to the recording relied upon by the General Counsel, that it was he who insisted on working with "common sense." Nunnery then told employees to observe the safety rules, and slow it down, stop at the crossings and drive at 15 mph. Neilan acknowledges telling Nunnery that if he wanted them to follow some of the rules, they had to follow all of them. Neilan stated that after the meeting, he advised those present to stop at all crossings and follow the safety rules which included driving at 15 mph. Barrett, who was present for only a short period of time recalled that Ventre requested that Nunnery get rid of the write ups and stated that the employees would start following the rules the following day. He also stated that he heard Nunnery telling the men to stop at the crossings because the numbers were better when they did so, which he found implausible. Martinez recalled a discussion about the cost in insurance claims, and that there was a discussion about more strictly adhering to the rules, including stopping at the crossings. Employees stated that doing so would slow down the job. As Martinez testified, Nunnery shouted that he did not care how long the job took as long as the rules were followed 100 percent. Martinez testified that on the following day he came to full stops at all crossings and followed the seatbelt rule. Ventre similarly testified that Nunnery complained about the insurance costs, stated that he did not care about productivity, lift counts and that he wanted the men to obey all the rules. Ventre recalled that Nunnery questioned stopping at the crossings, but was told that employees had previously been made to sign an agreement that they do so. Then Nunnery stated that it was acceptable to do so. He recalled employees stating that if they followed all safety rules, the employees would hardly get anything done.

Respondent points to the fact that none of the disciplinary notices which were intended to be issued that evening con-

[18] Other topics discussed concerned the use of hardhats, the condition of the trucks, back injuries, and repeated complaints about the seatbelts from various employees.

cerned themselves with the issues of stopping at the crossings and driving at 15 miles per hour. Rather it was Neilan and Ventre, respectively, who brought these matters up.[19] Nunnery testified that such matters were not intended to be part of his meeting; that the men were badgering him and he became frustrated with them and said they could stop at the crossings if they wanted to. As Nunnery testified:

> I never, in a million years, thought that these guys—especially the type of guys these are—these are four of the top veterans out there on the roster. They cover for Supervisors. They understand productivity. They understand that stopping at every crossing and slowing down would drastically cut into our productivity and into our service. I never, in a million years, thought that they would stop at every single crossing and do that to me.

Nunnery testified that portions of the discussion as recorded were missing as the person who purportedly made the recording moved around the room. (Indeed the recording, and transcript, reflects that a number of portions are inaudible.) When challenged on this assertion by counsel for the General Counsel, Nunnery acknowledged making the statements attributed to him on the recording and in the transcript and could not identify much missing material, noting the tape had been made over 1 year previously. Nunnery did testify that Neilan had said that wearing PPE would slow down work and that he refuted that assertion; and that such an exchange was not captured in the recording.

According to Bartee, there was an understanding at the end of the meeting that the most senior employees would police the less senior, and the disciplines would be withdrawn. There had been no intention to discipline anyone for a speed infraction. Bartee asserted that the 15-mph speed limit applies to outside drivers and that H&M employees typically travel as fast as their truck allows to get the work done more quickly. Neilan insisted on enforcing "every rule in the book" including stopping at crossings. Bartee acknowledged that Nunnery told Neilan to stop at the crossings, if that was the rule, but he didn't want the work to slow down. When Ventre brought up the issue of the speed limit, Nunnery said that you are following the rule, that's fine, that he was not telling employees to break the rule but to get the work done.

The following evening Nunnery distributed a memorandum to other H&M managers which states in part (as relevant to the above discussion):

> Safety
> Seatbelt Violations
> Ernie Martinez—2d offense in 4 days
> Losman Enriquez
> Alex Ventre
> James Roper
>
> Alex Ventre—One airline
>
> Letters issued to all parties involved. I also will hold the Ops Manager on duty accountable going forward and issue letters if the crew is not following the rules.

The evidence fails to establish precisely when Croxton management (other than Bartee, who was there) was informed that Nunnery had agreed to rescind the warning letters in exchange for a promise about compliance with and enforcement of the safety rules.

The Events of December 13

Management on Site During the Relevant Period

Oliphant was the scheduled operations supervisor for the 7: a.m. to 7 p.m. shift on December 13. In actuality, he worked from about 6:30 a.m. to 11 p.m. on that day. Newcomb arrived at the facility at about 8 a.m. and remained there until 2 a.m. the following morning. Nunnery arrived at about 7 p.m. Bartee was not scheduled to work that day, but was called in at about 6 p.m. and arrived at about 7:30 p.m. Mike Robinson was the scheduled operations supervisor from 7 p.m. to 7 a.m.

Three NS managers were on site as well: Tayrece Gause was the assistant terminal manager during the afternoon hours; Scacco was at the facility from 6 a.m. until about 5 or 6 p.m. that evening and Martins came on for the night shift.

Work Assignments on December 13

On the morning of December 13, Oliphant called both Neilan and Ventre to come into work prior to the start of their 11 a.m. shifts.[20] Neilan declined, but Ventre came in at 9 a.m. Ventre was assigned to work on a crane with another employee. At about 11 a.m. Railroad Manager Gause asked Ventre to clear the track where he was working. This required Ventre to ground containers that had previously been placed on the train. Ventre testified that this adversely affected the so-called "lift per man hour" (LPMH) statistic used to gauge productivity.

At 11 a.m., Gonzalez, Barrett, Neilan, Carl Crockett, Martinez, Roper, and Vicente came in to work their scheduled shift. Three employees also scheduled to work called out.[21] Three new employees were in training; two were assigned to unit members and one worked directly with Oliphant. In all, there were 11 employees who came in to work that shift, including the three trainees.

[19] It should be noted that in his initial testimony, conducted by counsel for the General Counsel pursuant to Rule 611(c), Nunnery denied that such matters had been discussed at the meeting.

[20] There is a dispute among witnesses for the General Counsel and H&M as to whether there was adequate manpower on that day. Counsel for the General Counsel relies in part on an apparent contradiction in Oliphant's testimony on this issue. Having reviewed the record, I conclude that Oliphant misapprehended General Counsel's question and did not intend to state that there was inadequate staffing on that day.

[21] Misrain Garcia, Esteban Vivas, and Jack Howells.

It appears that the men began their workday previous the safety protocols as agreed to the following evening including the use of seatbelts and PPE. At least some of the employees also adhered to the 15-mph speed limit and stopped at the crossings. Employees who testified to such effect included Neilan, Martinez, and DeJesus. Ventre testified that he wore his seatbelt for the entire shift but only stopped at the crossings when someone was ahead of him, to yield to outside drivers or at blind spots. He asserts that he drove at his typical rate of speed. Ventre and Gonzalez testified that some, but not all of the drivers stopped at the crossings.

At the beginning of Gonzalez' shift he was assigned to operate a crane and was assigned three men to his crew. This included Martinez, who had previously told Oliphant that he had to take the day off for a doctor's appointment. Oliphant told him that he was needed at the site and he should step out for the appointment and then return to work. Martinez left the facility at about noon and returned at 1:30 p.m.

Barrett was also assigned to operate a crane and three men were also assigned to work with him: Neilan, Ventre, and Crockett. The two crews were assigned to work on the same train (the 212) and effectively worked as one.

Gonzalez' crane became disabled at the beginning of his shift. Gonzalez called Oliphant and said he wanted to bring it in and get another machine. Oliphant directed Gonzalez to stay with the disabled machine and he arranged for a mechanic to come out to the pad while Gonzalez remained with the crane, as instructed. It took about 1-1/2 hours to repair the crane. Once the machine was repaired, Gonzalez was reassigned to work on the 20K train with a crew that included Roper,[22] Vicente and Martinez. Vicente was later assigned to the crew, but he had a trainee with him and left the crew for about a half hour. Both Gonzalez and Vicente testified that work productivity was slow because the crews were too small and crane operators had to wait for drivers.

After Gonzalez was reassigned to the 20K, there were four employees left to work on the 212: Neilan, Ventre, Crockett, and Barrett. Crockett had been assigned a trainee who separated from him at some point and drove off in a different truck. At about 1:15 p.m. this trainee became involved in an accident, hitting a parked chassis and causing what was eventually determined to be $18,000 in damages.[23] The accident caused the crew to lose Crockett for an hour because he had to go to the H&M office to give a statement. Neilan asserted that Crockett's absence impacted the crew's productivity while unloading the 212. Oliphant testified that the loss of the trainee for the balance of the workday had no impact on the operation. Newcomb testified that the accident would not have impacted the release time of the 23Z.

In an email to H&M managers dated December 15, Scacco questioned why the accident had not been reported to NS when it occurred. Nunnery acknowledged not promptly reporting the matter, adding, "Tim was tied up with Mr. Connors who was at the terminal and meeting most of the day. Charlie [Oliphant] focus on getting accident processed, employees to Concentra for drug and alcohol testing. This was the day we had union issues that distracted Charlie and the rest of the team."

At 2 p.m. that afternoon, a crew consisting of one crane operator and two drivers reported to work. According to Neilan, at the time these men started working Barrett's crew consisted of only two drivers: Neilan and Ventre. Barrett testified that working with such a small crew created a lot of downtime as he had to sit in his crane waiting for the next driver to bring a load. Ventre went to lunch at 2:30 p.m., leaving Barrett with only one driver. Crockett had rejoined his crew at about 1:15 p.m. Then Barrett's crew and the 2 p.m. crew worked together.[24] When Ventre returned from lunch he called Oliphant for an assignment. Receiving no answer, he joined the 2 p.m. crew until about 4:30 p.m. when the 11 a.m. crew returned from lunch. The employees on this shift had been sent to lunch at 3:30 p.m. while there was still material left to unload on the 212 and 20K. According to Neilan and Barrett, the normal procedure given the amount of material left to unload would have been to unload and then go to lunch. According to Oliphant, he sent the employees to lunch at that time because H&M had already "blown availability" on the 212 and he wanted to get the men to lunch and back out to work on the 23Z.

Vicente testified that he complained to Oliphant about the small size of the crews that day and that he heard Gonzalez complain to Oliphant over the radio that it did not make sense to have such small crews, and that they were not getting anything done. Oliphant generally denied having manpower issues that day, but did not specifically deny having these discussions with Vicente and Gonzalez.

Oliphant testified that he did not notice productivity issues on December 13 until midafternoon, sometime after the trainee accident, but prior to the 3:30 p.m. lunchbreak for the 11 a.m. crew. Oliphant testified that after the accident, he went out into the yard and noticed Neilan, Ventre, Gonzalez, and Martinez "rolling real slow." In particular, Oliphant testified that the men were taking a long time to fasten their seatbelts, bring boxes out, and were stopping at every crossing. Oliphant also noticed that Vicente was working slowly, but attributed that to the fact that he was working with a trainee. Oliphant testified that he reported his observations to Newcomb, who told Oliphant to handle it. Newcomb's testimony was that Oliphant reported his observations about the slow pace of work prior to 12 noon on that day, and further stated that he believed the employees were engaged in an intentional slowdown. Newcomb told Oliphant to speak with the men to pick up the pace.

Oliphant also called Nunnery in the afternoon to see if there were any residual issues from the prior evening's meeting which might have caused hard feelings. Nunnery told him that they had gotten everything straightened out, and there should

[22] Roper was discharged later that day and escorted from the property at about 8:30 p.m.

[23] Oliphant prepared a report, sent to Newcomb, Nunnery, and other H&M personnel notes that a vehicle was down "due to being involved in a serious accident in E lot and has extensive damage to front right corner and will require repair before being returned to service."

[24] This was described in the record as "cycling." The trains involved were the 212 and 23Z. Drivers would remove loads from the 212, park them in the lots, and then come back with empty containers for the 23Z.

not be any issues. Oliphant also asked NS Manager Gause to pull lift reports for two cranes operating at the time. He reviewed records for a 1-hour period in the early afternoon and determined that the LPMH as reflected in the report was below par.

Various employees testified to a discussion Oliphant had with them during their 3:30 p.m. lunchbreak. Martinez testified that Oliphant said that the day seemed like it was dragging and the response was that they had been shorthanded all day and were following the safety rules. Gonzalez said they could not go any faster due to the way the crews were set up. Vicente testified that Oliphant talked about honor and respect and then he told the crew that they would be "frozen"—that is obliged to remain at work—until the 23Z was done. Oliphant testified to a discussion held with Neilan held prior to his generally addressing the crew. He told Neilan that the men were playing games, that they needed to get the job done and to stop messing around. According to Oliphant, Neilan "hem-hawed" and said that if Oliphant would allow them to not wear seatbelts, the trains would get out on time. Oliphant said no, there was a safety standard for that and that he did not have the authority to make that call. According to Oliphant, nothing was mentioned about crew size until later on. After his discussion with Neilan he went to address the crew, making it clear that he knew what was going on and it was time to stop. According to Neilan, this private discussion occurred after Oliphant addressed the crew. Neilan testified that Oliphant asked why it was taking so long to get the job done and Neilan replied that they had no manpower and were trying to obey the safety rules. Oliphant said the men were frozen until the 23Z was finished.

After lunch was finished, the employees dispersed to various assignments: the 20K, the 212, and the 23Z. By 5 p.m., according to the employees, there were three crews working on the 23Z consisting of three operators and nine drivers.[25] Between 6:30 and 7 p.m. one employee was sent to the doctor due to reporting pain in his left arm. Gonzalez, who was operating a crane, said that he was waiting for drivers to come to his machine because the crew sizes were too small. Oliphant testified that when they started loading the 23Z, Neilan, Martinez, Gonzalez, Ventre, and Vicente were all still stopping at crossings and taking an extremely long time to get in their trucks and fasten their seatbelts. He did not speak to these employees at this time. At about 5:30 p.m. or sometime thereafter Neilan spoke with Oliphant, complained the crew sizes were too small and that there was not enough manpower to support the amount of the machines. Neilan suggested that Oliphant direct Gonzalez to park his machine and begin working as a driver. Oliphant agreed with Neilan's suggestion. After this point, Barrett operated with a crew of six drivers: Neilan, Gonzalez, Ventre, Martinez, Crockett, and Vicente. According to Neilan, Barrett and Vicente, productivity increased after the crew was reconfigured.

At 7:30 p.m., Oliphant sent the 2 p.m. crew to lunch as a new crew arrived. Four employees arrived for that shift, one being off. One of these employees was Alfonso DeJesus who testified that Newcomb asked to speak with him while he was punching in. Newcomb told DeJesus that a couple of senior guys were being watched. DeJesus asked who they were, and Newcomb told him not to worry, that he didn't need to know. Oliphant, who was present, then told DeJesus to just do his job and stay out of trouble.

DeJesus then went to work on the 23Z. DeJesus testified that the loading of the train was not behind at that point, he did not see anyone deliberately slowing down and the train was loaded before 9 p.m. It then had to be locked down and certain corrections made.

When the 2 p.m. crew returned from lunch at 8:30 p.m. they were not assigned to finish the 23Z; rather, they were sent to work on the 211 which was due to be released at 2:30 a.m. the following day. Oliphant testified that this was because it would not have made sense to put them on the 23Z because there was too much to do, and he was trying to protect the next train to avoid another service failure.[26] When the 7:30 p.m. shift arrived at work that evening they were assigned to work on the 23Z.

Further Observations and Discussions Between Management and Crewmembers Regarding the Pace of Work

Newcomb testified that after he spoke with Oliphant, he started observing the facility while riding in his truck. He reported that he started driving around at about 3 p.m. and continued to do so until about 9 or 9:30 p.m. without taking any breaks. He observed Neilan several times between 3 and 5 p.m. Newcomb asserted that he saw Neilan driving at the speed at which the trucks generally idle, stopping at every crossing and taking a long time to hook up his air lines. Newcomb also stated that Neilan was taking 10 minutes to make moves that should have taken only 3–5 minutes to make. Newcomb testified that he observed Neilan, Ventre, Gonzalez, and Martinez all working in the same area of the yard. He observed Ventre during the period between 3 and 5 p.m. and again between 5 and 6 p.m., at which time he stopped to speak with him (as discussed below). Newcomb testified that Ventre was driving slowly, generally taking his time in performing various work tasks, stopping at every crossing, and driving 3 to 5 miles per hour while going through crossings. Newcomb had similar observations regarding Gonzalez, who he observed during the period between 3 and 5 p.m. In addition to driving between 3 to 5 miles per hour, Newcomb stated:

> He was backing into the containers slowly. Then he was sitting and waiting. Then he would get out of his truck, hook his air lines up and he would sit back in the truck and, kind of, sit there without doing anything. He was at the computer, he

[25] Oliphant testified that at the time he had 15 employees working on the 23Z, including the trainees.

[26] Employer and NS records analyzed by counsel for the General Counsel appear to show that during the period from August 9 to December 11, there were six instances where the facility experienced two service failures in 1 day and three additional instances where there were three. In addition, between the period from July 6 to December 3, 2012, there were 15 occasions on which the 23Z was released after its release time of 9 p.m., the latest being 11:15 p.m. on November 25. There were two occasions where that train was released at 11 p.m.—on November 2 and 12, and multiple occasions where it was released after 10 p.m. This data is reflected in GC Exhs. 59, 82, and 88.

> wasn't doing anything; he was just sitting there. And then he would attempt to pull away. He was slowing down at every crossing—stopping at every crossing through the middle of the yard. And again, he was taking approximately 10 minutes to get back to the track with anything he was pulling.

Newcomb offered a similar description of Martinez' activities. Although Vicente was also working slowly, Newcomb attributed this to the fact that he was with a trainee at the time.

Nunnery testified that he arrived at Croxton between 6:45 and 7:30 p.m. and began driving around the facility. He followed Neilan, Gonzalez, Martinez, and Ventre and determined that they were not driving 15 mph. He testified that he followed the four men for a period of from 5 to 10 minutes each and also sat at the middle crossing and watched them as they came through. As counsel for the General Counsel notes, at other times in his testimony, Nunnery was vague in his recollection about how, how long and where he made his observations of the four men that evening. At about 7:30 p.m. Nunnery parked his truck and then rode the yard with Newcomb for the next couple of hours.

Newcomb testified that he had discussions with Neilan, Gonzalez, Martinez, and Ventre between 5:30 and 7:30 p.m. that evening. He first spoke with Gonzalez. As Gonzalez testified, Newcomb and Oliphant approached him in Newcomb's truck just before 7 p.m. Gonzalez went over to speak with them. Newcomb asked why things were going so slow and Gonzalez testified it was because they had worked in really small crews. Newcomb told Gonzalez that he did not know what was going on but, "he wasn't going to be able to help us if the Railroad was involved." Newcomb's account is that Gonzalez stated that Newcomb didn't need to talk to him, it had nothing to do with him and then he walked away.

Newcomb spoke with Neilan twice that evening; the first time being around 7:30 p.m. According to Neilan, he asked what was going on and why things were taking so long. Neilan responded they were low on manpower and they were trying to obey the safety rules. Neilan testified that Newcomb then told him that if the train is not out of here by 9:30 p.m. he and the men were going to be barred from the terminal. Neilan asserts that he told Newcomb that they would get the job done for him. Newcomb's account differs in that he states Neilans' response was that things were so slow because they were made to wear seatbelts. Newcomb's response was that seatbelts were worn in other facilities, and it is not an issue. Newcomb also stated that the belts were worn in September and early-October and it didn't slow work down then, so why is it today? According to Newcomb, Neilan had no response. Newcomb then said that if the train was late, Scacco would be angry with both of them. He then returned to his truck and drove off.

The second conversation took place sometime later, after Newcomb had spoken with other crewmembers, as discussed below. According to Neilan, Newcomb, accompanied by Nunnery, got out of the truck and this time Nunnery asked what was going on. Neilan said nothing. Newcomb told Neilan that he was going to cause good men to lose their jobs. Neilan told Newcomb that he was just doing his job. Then, according to Neilan, Nunnery said that he knew what he was doing and said that he would reinstate all the write ups that he had thrown out the prior evening. According to Newcomb, on the second occasion he ran into Neilan, saw him sitting in the yard and asked why he was not removing the interbox connectors (IBCs). As Newcomb testified, Neilan stated, "[S]omebody else can fucking get those . . . one of the junior men can get that." Nunnery remained in the truck and was not part of the conversation.

As Newcomb testified, he next spoke with Ventre and told him that he had to call the Railroad and tell them the train was late, Scacco was angry and NS would have a problem with both the Company and the employees if the train does not get out on time. Ventre had no response and returned to his truck. Ventre offered no testimony regarding this sort of an encounter with Newcomb on this evening.

Newcomb and Nunnery also spoke with Vicente. According to Vicente, Newcomb asked why they were working so slowly and he replied that he was doing his job as he normally did. Nunnery then said that if they did not get the train done on time they would be barred from the yard. Vicente testified that he responded by stating that he was not doing anything wrong but that if they fired him he had plans to move to Florida. Newcomb then asked Vicente if he thought they would have the train done in 20 minutes and Vicente told him he would not have it done if they kept holding him up. According to Newcomb, Vicente's response to his inquiry of why things were going so slow was that he wasn't part of it, he was training an employee, and it was slowing him down.[27]

Newcomb stated that he also spoke with Martinez who said, "I guess we're fired now." Newcomb asked, fired for what? Martinez replied, "I guess you are getting rid of us now." Newcomb said he just wanted to get the train out, the railroad is upset because there is no good reason to be late. Martinez simply got back into his truck. Martinez said that when he spoke with Newcomb, he was told that if the train was late he would not be working there anymore. Martinez said he was stunned and returned to his truck. Martinez testified that he reported what Newcomb had told him about losing his job to Neilan who told Martinez to continue working and not to worry. As Martinez testified, Vicente reported that Newcomb had just said the same thing to him.

Bartee testified that Nunnery called him in to work on the evening of December 13 because things were slowing down, and he was needed to manage the work crew. He arrived at the facility at about 7:30 p.m. and drove around the facility in his truck. He saw Neilan at 7:30 p.m. and on two other occasions that evening. He asserts that Neilan was moving slowly, taking his time to pull pieces, and stopping at the crossings. Bartee said this was unusual for Neilan who typically was one of the fastest employees. Bartee said he spoke with Neilan about the pace of work and Neilan told him that they could work faster if they didn't have to wear seatbelts. Neilan did not recall having a conversation with Bartee that evening. Bartee testified that he

[27] Vicente testified that he observed about six or seven managers at the terminal that day, driving around in pickup trucks. He specifically named Oliphant, Nunnery, Newcomb, Bartee, and Connors. He further stated that this was unusual; that there were seldom more than two managers at the facility.

observed Martinez, Gonzalez, and Ventre working in a similar fashion; that other employees were pushing themselves to try to catch up and that none of the other employees were driving slowly or stopping at the crossings. Although Bartee did spend some time driving the yard with Nunnery, it appears that he also spent some time by himself, sitting in a stationary position observing the work in the yard. According to Bartee, Neilan's pace did not change from the time he arrived that night until the end of the evening.

There is no testimony from any witness that any employee told the other managers that, on the prior evening, Nunnery had rescinded the discipline for safety violations and that he had, at least in part, approved stopping at all crossings and driving at 15 mph to in the service of observing the Employer's and NS safety rules.

According to Newcomb, however, after the aforementioned discussions with the crew took place beginning at around 7:30 p.m., Neilan, Ventre, Gonzalez, and Martinez all picked up the pace and worked normally until the 23Z was released at 9:40 p.m. This was corroborated by sworn testimony offered by Nunnery in Neilan's unemployment hearing to the effect that that, after the employees were told they could lose their jobs, production sped up that evening.

Discussions with NS Management

At some time between 5 and 6:30 p.m., Newcomb called Scacco to notify him that the 23Z was going to be late.[28] As Newcomb testified, Scacco told him that NS would have a problem with H&M and its employees. At this time, Scacco did not threaten to bar employees should the train be released late.

Scacco testified that after he had arrived at home after his workday, Newcomb called him and explained that he and other H&M supervisory personnel were observing four individuals stopping at crossings and moving at a snail's pace. He then named Neilan, Ventre, Gonzalez, and Martinez and told Scacco that the 23Z was in jeopardy of having a late release because of their actions. Scacco told Newcomb to tell the employees that there better not be any late releases or there would be issues with them in the morning.[29]

At about 7:30 p.m., George Martins, the NS manager who had just started his shift at 7 p.m., came over the radio and demanded that employees tell him what time the 23Z was supposed to be released, calling their names out individually. Both Barrett and Vicente testified that this was an unusual practice. Martins repeated Gonzalez' name over the radio a number of times, asking for the 23Z release time. Gonzalez testified that although he knew the release time was 9 p.m. he did not reply to Martins because he felt that Martins was being condescending. As Martins continued to call employee names out over the radio, some responded and others did not. Newcomb said that he sought Martins out because he felt the instructions he was shouting out over the radio were improper. According to Scacco, Martins reported to him that he had observed employees stopping at the crossings and pulling out slowly.

Neilan testified that he spoke with Martins about a half hour after he called out to the H&M employees over the radio about the 23Z. Martins approached him, and Neilan got out of his truck and told Martins that there had been limited manpower there on that day and that was why they were behind. Martins replied that they should just get the job done.

Martinez testified that he spoke with Martins after hearing him on the radio, and Martins asked him if he could give a little extra. Martinez responded he had no problem with that but that they were shorthanded. According to Martinez, Martins said he knew that. According to Martinez, his conversation with Newcomb, described above, occurred shortly after this encounter with Martins.

The Loading and Release of the 23Z

There is some dispute in the record as to the actual scheduled release time of the 23Z. Neilan, Barrett, and Ventre testified that the release time was 9:30 p.m.; Gonzalez and DeJesus testified that the release time was 9 p.m. Scacco testified that the release time was 9 p.m. and that is confirmed by other documentary evidence placed into the record by the General Counsel. I conclude from the record as a whole, including the employer records cited by the General Counsel in his posthearing brief, that the release time was 9 p.m. and the train was released to NS 40 minutes after its scheduled release time on December 13.[30]

Vicente reported that at around 8:45 p.m., he heard Nunnery and Newcomb on the radio addressing Neilan, Ventre, Gonzalez, and Martinez asking what they were doing. They replied that they were "running with their empties." They were instructed to drop their loads and lock up the A track. Vicente testified that he thought that the instruction was unusual.

Various witnesses testified as to the time the 23Z was loaded. Neilan, Ventre, Gonzalez, and Barrett all testified that it was loaded at about 9:10 or 9:11 p.m.[31] Vicente testified that it was finished at 9:15 p.m. and that he kept track because of the commotion on the radio. DeJesus testified that the loading was completed at about 9 p.m. and then it took another 10 minutes to lock down or finish whatever tasks needed to be accomplished. Gonzalez performed the final lockdown check on the 23Z that night, driving the length of the track. On his final check, he found four pieces that were not properly locked down, but, as he testified, that was completed by 9:11 p.m. After locking down, as Gonzalez testified, he called Oliphant and told him that the train was good to go. The train was re-

[28] Newcomb testified that it was his general practice to notify Scacco when it was anticipated that a train would be late.

[29] Scacco denied threatening to bar the employees from the facility.

[30] Newcomb testified that, at the time, H&M had a self-imposed mandated release time for the 23Z of 7:30 p.m., but this testimony is unsupported by other credible evidence. It appears from Vicente's testimony that this timeframe may have been initiated after the events in question here.

[31] Ventre testified that he looked at his watch when they finished loading. Vicente stated that he paid attention due to the commotion on the radio. Gonzalez similarly testified that due to the "commotion" he was watching the time and noted the time they finished the train. Martinez could not recall the specific time the train was finished but recalled feeling relieved when it was.

leased to the railroad at 9:40 p.m., or 40 minutes past the scheduled release time of 9 p.m.

After the 23Z was loaded, Oliphant sent Ventre to speak with Nunnery. Bartee was with Nunnery at the time. Ventre complained about the number of times he had buckled up that day. Nunnery asked him whether he thought this was a game. Ventre then asked Nunnery how many hours he wanted him to work because, by that time, Ventre had already been working for 12 hours. Nunnery replied that, if he wanted, he could keep Ventre for 16 hours. He then handed Ventre two load lists, one for him and one for Neilan. According to Ventre, as he was walking away, Nunnery said, "[b]y the way, I never lose." The 11 a.m. crew then worked on the 211 train and were eventually sent home at 11:30 p.m.

Oliphant's Report of Productivity on December 13

Oliphant prepared a customary turnover report documenting the number of hours employees on a given shift have actually worked and their productivity. Oliphant reported in his turnover report for that evening that there were (1) 234 lifts; (2) 121.25 man hours; and (3) 1.93 LPMH. Newcomb testified that the LPMH statistic was one, but not the decisive, factor he relied on in deciding to terminate the employees. Oliphant's report fails to account for the fact that Martinez left the facility for approximately 1.5 hours and inaccurately reflects that the trainee who was involved in an accident on the site worked 7.5 hours that day when, in actuality, he worked for 2 hours and 15 minutes. He was sent home after one additional hour he spent providing a statement regarding the accident. Counsel for the General Counsel has argued that if the appropriate adjustments were made, the LPMH for December 13 would have been 2.03 hours and further argues that Oliphant's report fails to designate trainee hours as unproductive. The General Counsel suggests further ways that the statistics on the report should be adjusted and contrasted with the report issued by the night-shift supervisor, since Neilan, Gonzalez, Ventre, Martinez, Barrett, and Vicente all worked during that shift, from 7 through 11:30 p.m. The suggestion posited by the General Counsel generally is that the numbers have been manipulated to reflect an inordinately low LPMH statistic. Counsel for the General Counsel further notes that, contrary to written instructions issued on December 11 (discussed above), Oliphant fails to document the reasons for the late release of the 23Z.[32]

Contact with the Union

Domini, testifying almost exclusively with the aid of notes, stated that he was in contact with Neilan on three occasions during the afternoon of December 13; the first of these in midafternoon. Neilan expressed the employees' displeasure at having to wear seatbelts and PPE, and Domini told him that the Company wanted that. At about 5 p.m. Connors called him and said there was a slowdown of work at Croxton. Connors was concerned about the NS response, and asked Domini to speak to the workers. Domini then called Neilan; told him that the railroad was upset with H&M for the speed of operations and that they had to get the trains out on time. Domini testified that Neilan stated that the workers had had enough of this nonsense and if they wanted [us] to be safe, they would be extra safe. Domini told Neilan to get the train out on time and avoid problems. According to Domini, there were subsequent discussions with Connors about the slow pace of work and the fact that the workers were stopping at every crossing. He then spoke with Neilan again to stress the importance of getting the job done on time. According to Domini, Neilan said that the men had had enough of this "BS" and didn't care anymore. Neilan testified that, to his recollection, he spoke with Domini on two occasions that day. He stated that he told Domini that things were going slowly because of the safety rules and lack of manpower.

Domini also spoke with Newcomb and Nunnery on that day. According to Domini, Newcomb stated that he had been following the four men; "they" were driving between 3 and 9 miles per hour and the railroad was pretty upset. Nunnery similarly told Domini that things were going slow and asked him to come to Croxton to speak with the men. Domini told Nunnery to try to work it out. He replied that it was too late and that the railroad was "pissed off." Domini had his last conversation with Connors at about 7:30 p.m. He did not speak with Ventre, Gonzalez or Martinez on that evening.

Neilan, Ventre, Gonzalez, and Martinez are Put Out of Service

On the morning of December 14, Neilan, Ventre, Gonzalez, and Martinez all received phone calls informing them that they were suspended and should not return to work until further notice. Connors called Domini that morning and informed him that the four had been placed out of service; and Newcomb testified that he made a similar phone call. Domini asked Newcomb if there was any way to handle the situation, and Newcomb stated that he did not think so. Neilan contacted Domini as well, and informed him that he thought the workers were being accused of a slowdown, which he denied. Neilan asked Domini to speak with John Carey, the head of the railroad police, to get surveillance tapes of that evening which Neilan believed would show that the four had been following the safety rules and operating properly. According to Domini's affidavit, Neilan raised the issue of lack of manpower at this time as well. Neilan told Domini that Newcomb had threatened employees Zane Berardesco and DeJesus, warning them not to side with the four men placed out of service. Domini also spoke with Gonzales on three occasions that day and was told that they had been undermanned and had been following the safety rules. Gonzalez testified that on one of these occasions, Domini told him that the men should have been expecting it. Domini did not speak with either Ventre or Martinez on that day.

Ventre testified that on December 14 he went to Croxton and spoke with Mike Hannah, who was the train master on the prior evening. Hannah checked the computer and informed Ventre that there had not been any late trains and that the 23Z had been released on time, but there had been an issue with the railroad crew.

[32] The General Counsel further challenges the veracity of this report as there are two versions in evidence, one seemingly issued prior to the release of the 23Z, "predicting" a release time of 9:40 p.m.

New Work Rules and Policies are Posted

When Barrett punched in for work on December 14 he noticed about 12 new notices posted near the timeclock in the breakroom. Similarly, when Gonzalez went to the facility to clean out his locker a few days later, he noticed about eight new notices. These notices were dated December 14, became effective the following day and communicate work rules, intimating that a failure to comply could result in discipline.[33] There is no indication that any of these notices were sent to the Union prior to their posting.

Newcomb's Investigation

Newcomb initiated an investigation into the events of December 13 the following day and continued it until Monday, December 17. He testified that he spoke with the managers, including Nunnery, Bartee, and Oliphant and obtained written statements from them. He also drafted his own statement about what he had observed. He directed Nunnery and Bartee to look at records for December 13 to see how many lifts had been performed and who was working. He also spoke with Martins. Nunnery testified that his review of the Employer's computer system showed that fewer boxes had been unloaded during the period from 11 to 8 a.m. Newcomb also conducted short interviews with three employees: Barrett, Vicente, and Crockett. None of these employees offered any substantive information. H&M did not interview Neilan, Ventre, Gonzalez, or Martinez during this investigation.

The Union's Investigation

Domini began his investigation into the events of December 13 on December 15. His notes and testimony indicate that he spoke with a total of 14 employees. Some of these interviews took place on December 15, but most took place on Monday, December 17.[34]

Vicente testified that he spoke with Domini on Saturday, December 15. Domini asked Vicente if there had been a slowdown on December 13 and Vicente said that he did not think so. Vicente also stated that he told Domini that he felt threatened because it appeared as though events had been orchestrated. He claims to have told Domini that the crew sizes on that day were too small; that he complained about it to Oliphant and Oliphant replied that was the way management wanted it. He also reported that there were more managers than usual working on that day and that he had been threatened with being barred from the facility. When he said that, Domini replied that Vicente should just worry about himself and his family and that he would investigate the situation.

Domini confirmed that Vicente told him that there were only a few men on each crew and that Martins was upset and yelled at the men. Vicente also told Domini that Newcomb had addressed them about doing the speed limit but that Vicente told him that Newcomb had not threatened him. One version of Domini's notes indicates that Vicente told him that there were not enough men for the job and that the train got out on time.

Barrett testified that Domini spoke with him on December 15 and when asked what had happened on December 13, he replied that he did not know and was confused. When Barrett explained that he had worked there for 16 years and had never had a problem with the Union, Domini told him to continue doing what he had to do, because "these guys" weren't fooling around. Pursuant to guided questioning from the General Counsel, Barrett stated that Domini did not ask him about a slowdown, who else he worked with on December 13, what time the 23Z was released, whether there had been any discussions between Barrett, and H&M management regarding productivity. However, Barrett had previously testified that he told Domini that the men had been accused of a slowdown.

Domini testified that Barrett told him that things had been going slow on December 13 and they could have used more people; he also stated that Martins had told the men to knock off "this shit." With regard to the issue of meeting with Scacco on December 11, Barrett reported that Scacco said that he wanted the senior men to set a good example, that he wanted his trains out on time, and there was no negative discussion about H&M. Barrett professed to have no recollection of what his coworkers said; only what Scacco told them.

DeJesus testified that he spoke with Domini on December 15. He questioned Domini about the men and Domini said he was working on it. As DeJesus testified, Domini asked questions about what happened that night and whether the train left on time. DeJesus said that he responded that the train had left at 9 p.m. Domini asked whether the men had followed safety procedures and DeJesus replied that they had safety gear and had made full crossing stops. Domini asked whether he had heard Martins over the radios. DeJesus replied that Martins was on the radio asking the employees if they knew what time the train gets done, and Barrett answered. DeJesus told Domini that he told Martins that they knew what time it should be done and were trying to get it finished on time. Domini asked DeJesus how many men were working with him that night and he provided certain names: Martinez, Vicente, and Neilan. Domini asked DeJesus what Newcomb had spoken with him about and he told him the substance of the conversation and Domini counseled DeJesus to stay out of trouble.

On cross-examination by H&M, DeJesus stated that he spoke with Domini a few times. When asked whether he had told Domini that the others on the crew were slacking off, DeJesus said he could not recall saying that. When cross-examined by the Union, DeJesus denied saying that the men were slacking off and stated that he told Domini that the men had been doing

[33] These policies are entitled: "Communications Policy," "Responding to Overtime Calls," "Holiday Vacation Notice," "Lunch Shifts," "Kick out Policy," "Weekly Consolidation of Time Off," "Booking Off," and "Ending a Shift." The "Booking Off" and "Communications Policy" both state that failure to follow their direction will be considered an act of insubordination and a failure to follow the "Lunch Shifts" policy could be considered an intentional slowdown of work. As will be discussed in further detail below, the parties' collective-bargaining agreement provides that "unauthorized slowdowns" and "insubordination" are both cause for dismissal.

[34] There are several sets of Domini notes pertaining to the investigation. There are original handwritten notes, another set of notes which are, as Domini testified, a combination of the original notes and material acquired during the investigation, his "knowledge" and a third set of notes which were typed by someone in the union office using the second set of notes which, by then were subject to not only additions, but deletions as well.

their job. He acknowledged, however, telling Domini that he had not been part of what was going on that evening.

According to Domini, none of the employees he interviewed told him that they had been threatened by H&M management.

On December 15, Neilan sent a text message to Domini reminding him to contact the railroad police for surveillance tapes and providing the name and phone number of a supposed contact there. As Neilan testified, Domini said he would call them.[35]

The Terminations

On December 17, Scacco contacted Gonzalez and scheduled a meeting with him for the following morning. When Gonzalez arrived, Scacco was not there. He called Scacco, who told him to speak with Nunnery instead. Prior to speaking with Nunnery, Gonzalez received a phone call from Domini stating that a letter had been sent to the four men which stated that they had been barred from Croxton. Gonzalez said that he had just spoken with Scacco and he had not mentioned anything about being barred from the property. After this call ended, Gonzalez called Scacco again and asked if he was barred from the property. Scacco replied that he did not know anything about it.

It appears from the record that the decision to bar the men was not made until after their discharge. On December 20, Neilan called a railroad police officer, Pete Urbaniwich, who told him that the men had not been barred. At the end of December, another railroad police officer, Peter Richey, told Martinez that the men had not been barred. Scacco testified that the decision to bar the men occurred after the decision was made to terminate them, but he did not specify when this decision was made. Newcomb testified that the decision to terminate the employees was his and the railroad's decision to bar them, "didn't put much bearing on me at that point because I had already made my decision."[36]

Gonzalez testified that he then met with Nunnery, Bartee, and Oliphant. Nunnery told Gonzalez that Roper had told him that a slowdown had taken place. Gonzalez denied being part of any slowdown. Gonzalez told Nunnery that the crews had been too small and that his crane had broken down. Nunnery asked why it seemed like the men had worked more slowly in the morning and then picked up production at night. Gonzalez claims that he told Nunnery that they had loaded a lot of empties in the morning but they were not recorded until later that evening. Gonzalez also said that the men were trying to follow the safety rules. As Gonzalez testified, Nunnery said that was not what he wanted to hear and if he said the right thing, he could keep his job. Gonzalez told Nunnery he would not lie for him. The meeting then ended. Gonzalez' account of this discussion was unrebutted.

As Newcomb testified, he made his decision to terminate Neilan, Ventre, Gonzalez, and Martinez on Monday, December 17 because he concluded that the four had facilitated a slowdown at the facility.[37] He testified that the LPMH statistics were a supporting, but not a significant factor in reaching the determination to discharge the employees. He based his decision on his observations of what occurred on December 13 and the fact that, in his estimation, there were no other factors in the yard that could have caused lower productivity on that day. As Newcomb testified, a H&M termination panel needed to approve his decision. Either on that day, or the next, a termination panel was held telephonically consisting of Newcomb, Harrington, Director of Human Resources Mary Hayes, and Manager John Vella. Prior to the panel, all of the statements and relevant documents were distributed. The panel approved Newcomb's determination to discharge the four employees.

In a letter dated December 21, H&M, by its attorney, notified the Union that Neilan, Ventre, Gonzalez, and Martinez had been barred from Croxton by NS and H&M because they had intentionally slowed down production at Croxton between 7 a.m. and 9:30 p.m. The letter specifies that the activity which demonstrated a slowdown was (1) driving at least 10-mph below the posted speed limit and (2) taking 30 or more minutes to make a single move whereas the average time to accomplish such a task would be 5 minutes. The letter adds that, as a result of the slowdown, productivity dropped to 1.9 LPMH as compared to an average of 2.7 LPMH. The letter further asserts as follows:

> Inquiries relating to that activity produced the following responses:
>
> 1. Harry Neilan stated that he and the other employees were proceeding slowly to try to be safe;
>
> 2. Abraham Gonzalez stated that he did not know what was going on and he directed inquiries to other employees; and
>
> 3. When Harry Neilan was asked by Operations Manager Charlie Oliphant to speak to the men and to work with H&M to get the train loaded on time, his reply was, "If you tell me we don't have to wear these seat belts, we will get the train loaded."

On January 4, 2013, H&M sent the four men individual letters informing them that their e-railsafe badges became ineffective with their termination and requesting their return.

In an undated letter from Martins to Nunnery, Martins detailed his experience at Croxton on December 13, compared the LPMH statistic on that day to a daily average and announced that the Railroad had permanently barred Neilan, Ventre, Gonzalez, and Martinez from the Croxton facility. Domini received official notice of this in an undated letter on or about January 11, 2013.[38]

[35] In his pretrial affidavit, Domini denied having any discussion with Neilan about the railroad surveillance tapes.

[36] This testimony is inconsistent with a prior position statement submitted by counsel for H&M where it is asserted that, "The Company's actions were further guided by the decisions of its client . . . . Both during the day on December 13 and thereafter, the Company received instructions from George Martins of Norfolk southern, who was particularly vexed by that he termed the "H&M Mayhem" that the individuals involved in the slowdown must be permanently barred from the Croxton facility."

[37] As set forth below, unauthorized slowdowns are prohibited by the collective-bargaining agreement and are cause for dismissal.

[38] Counsel for the General Counsel contends that Martins' letter to Nunnery was, in fact, drafted by H&M's Vice President of Human

The Union's Investigation of the Discharges of Neilan, Ventre, Gonzalez, and Martinez

Domini testified, again with extensive use of his notes, that he spoke with 11 employees on December 17.[39] It appears that most of these interactions were brief and employees failed to report any harassment, intimidation, or threats on the part of management. Scott Watts did tell Domini that things were going slow with the four discharged men, that he was working at a faster pace than they were, and that he saw them stop at every intersection. One version of Domini's notes indicates that after Martins yelled at the men over the radio, they picked up their work pace.

As was the case with the other interviews generally, Domini had no independent recollection of speaking with DeJesus; however, Domini's notes indicate that DeJesus told him that he had not been part of what was going on that evening and that the four men were slacking off and taking longer than usual to do the job. In his testimony at the hearing, DeJesus at first stated that he could not recall whether he told Domini that the four men were slacking off; he later denied doing so.

Domini testified generally that he spoke with various H&M managers by telephone on the days prior to the discharge decision was made, but could not offer any specific testimony about these discussions and they are not reflected in his notes.

At some point shortly before or after the discharges were effectuated, Domini sent text messages to Neilan, Ventre, and Gonzalez which stated: "Please supply me with a detailed written statement describing your work shift on 12/12, 12/13 and the events that lead [sic] to you all being put out on service on 12/14. This should [b]e emailed to me at wdomini@ufce312.org, please have Earnie [sic] do the same." Domini did not send this message to Martinez because he did not have his cell phone number, and both Neilan and Gonzalez said they would notify Martinez. Ventre did not receive this text because his cell phone plan at the time did not accommodate that service.

On December 18, Connors called Domini and informed him that Neilan, Ventre, Gonzalez, and Martinez were discharged and barred from the railroad yard. Neilan, who was sitting in a diner with Martinez at the time, called Domini that morning to find out if he had obtained the surveillance tapes from the railroad. Domini replied that his contract was with H&M, not the railroad. Neilan asked how the investigation was going. According to Neilan, Domini told him that Connors had his lawyers working on this, that he should start looking for another job, and that H&M could contest his application for unemployment. Neilan asked what the men were saying and Domini replied that they weren't saying much. Neilan said that was because they were being intimidated, and Domini replied that they were not threatened. Neilan said that Domini should do his job. Domini apparently took umbrage, told Neilan to go fuck himself, stated that any further communications would be in writing and hung up.[40] It is undisputed that Neilan never contacted Domini again.

On December 18, Domini had a conversation with Gonzalez who told him that his written statement was almost done and that Martinez was working on his statement as well. Domini said that they would meet as soon as the statement was completed. Gonzalez additionally received a couple of text messages from Domini requesting his written statement.

On December 18, Domini sent an email to Gillis and Nunnery where he wrote, "I understand that the above 4 union members have been banned by the NS Rail Road and terminated by H&M. To date I have not received any thing in writing confirming this, please advise me as soon as possible." Domini also requested, "copies of statements from the Managers involved, the NS supervisor on duty and documents showing the number of lifts completed and workers on duty each night for the months of October November through current date." Domini advised that the Union intended to file for arbitration but added, "[t]he union depending on the facts and results of the investigation may decide to withdraw the arbitration in the future."

In letters dated January 9, 2013, Domini asked Neilan, Ventre, Gonzalez, and Martinez to provide, by January 18, a "written detailed explanation of your work shift on December 12, 13 and 14 and the events which led to you being put out of service." The letters to Neilan, Ventre, and Gonzalez all refer to the prior request to provide such statements, made by text message on December 17. Martinez' letter notes that, "[a]s of today's date you have never contacted the union and I have not received a written statement from you." It is undisputed that none of the discharged employees responded to Domini's request for information in this regard.

The men all testified that they did not provide a written statement to Domini because they did not trust him and, variously, did not agree to the manner in which he had handled prior matters such as the Pavel Pimentel incident; his telling Neilan that he should look for another job; hanging up on Neilan and never calling back; Domini's statement to Gonzalez that he should have expected to be put out of service; the manner in which Domini handled the matter regarding the broken restroom facilities; the failure to zealously pursue a prior grievance regarding the termination of an employee named Jose Diaz; and a number of unresolved issues dating back to the fall of 2012. Ventre complained that Domini had failed to contact him until January 9, almost 1 month after his termination. He was also dissatisfied with the steps Domini had taken in the investigation, in particular interviewing employees who had not been at work on the day in question and telling employees to think about themselves and their families. He additionally did not like the way Domini responded to the initiation of new work policies in the fall of 2012 and the manner in which the new contract had been negotiated.

Resources Linda Gillis, but while the record reflects a series of email exchanges between the two regarding Martins' statement, the evidence does not warrant such a categorical finding.

[39] Some of the men Domini spoke with were not working during the relevant period; others who were working at that time were not interviewed.

[40] Domini testified that he was upset with Neilan's implication that he was taking H&M's side against the men as he had represented them since 2006.

On January 11, 2013, Domini received written statements from Newcomb, Nunnery, Oliphant, and Martins setting forth their observations on the evening in question and their interactions with the four employees as well as H&M and NS management personnel.

On January 22, 2013, Domini notified the National Labor Relations Board and H&M that it would not proceed to arbitration on the discharges of Neilan, Ventre, Gonzalez, and Martinez. Domini testified that, based upon his investigation, he had determined that the four men had intentionally slowed down production on December 13. He testified that the factors he relied on were: his interviews with employees on December 15 and 17; conversations with Neilan; discussions with Connors, Nunnery, and Newcomb; the letter from NS barring them from the property; and the fact that none of the men had provided written statements to him after multiple requests. Domini acknowledged that he did not meet with the employees prior to making this determination; he testified that he had told Neilan and Gonzalez that he would meet with them after receiving their statements.

On January 23, 2013, the Union and H&M attended an arbitration hearing on outstanding issues: application of the 4-hour overtime holdover policy; the scope of the contractual management-rights clause; and the use of seniority for overtime assignments. The arbitrator also made recommendation regarding the implementation and application of existing policies. On this day, Domini asked Connors whether he would consider hiring the four discharged employees in another yard. Connors stated that there were no positions available and that, because another union represented employees at another nearby facility, the men would have to come in as entry-level employees.

On January 24, 2013, the Union sent a letter to each of the discharged employees notifying them that the Union was closing its file on their case.

Neilan's Unemployment Hearing

Neilan filed an application for unemployment benefits and was awarded the same on January 23, 2013. On January 29, the Employer filed an appeal of this determination. On February 25, 2013, a telephonic appeals tribunal hearing was held before a hearing examiner for the appeal. Both Neilan and Nunnery were sworn as witnesses and provided testimony. The testimony was recorded, and a transcript was offered and accepted into evidence.

Nunnery testified that Neilan was discharged because he was "purposely trying to slow down the work to protest some-(inaudible) issues and discipline letters that was issued the night before." Nunnery continued:

> The Railroad got involved and when they seen where we were at with loading their trains up, they-they were monitoring it throughout the day, and they told us anyone involved in the work slowdown will be barred off the property if our train is late. We went out and told the individuals that was involved what the Railroad told us. And when the train was late that day they told me to put them out of service pending an investigation until we gathered the facts. And ultimately it was decided that they were barred off the property, meaning they were no longer eligible to come on the property to work for us. So basically I had no other alternative other than to terminate them because they couldn't come on the terminal to–to perform their jobs.

In response to further questioning from the hearing examiner, Nunnery reiterated that the Railroad said that the men "would be barred" meaning they would no longer be eligible to come on the property, and that due to the contract between NS and H&M they had to follow such procedures.

Nunnery testified about the issuance of the disciplinary warnings, the retraction of the letters based upon the agreement of employees to help police the safety rules and their general disagreement with them. Nunnery reiterated that NS wanted H&M to enforce safety rules and procedures and that when he came to the facility in about September, he did so, initially without much resistance. He further testified that after an absence in December, he noticed a slacking off of compliance with the safety protocols. According to Nunnery, Neilan was not noncompliant with the rules; he just complained that it would slow work down.

As for the meeting on December 12, Nunnery acknowledged that Neilan was not there to receive any discipline: "he was there on behalf of the employees that were getting discipline. . . ." He also said that he had never observed a work slowdown like that which had occurred on the following day.

When asked what conduct Neilan had engaged in that day which merited his discharge, Nunnery stated:

> He was-he was a part of the group that was-monitored that day by the Railroad, by my bosses, the owner of the Company, driving at an unusual slow-the speed limit's 15 miles an hour on the property; the guys were doing between 3 to 5 miles an hour. They were stopping at every single crossing.
>
> They were tasked with-let's just say, at a matter of time where he's-there was 12 guys on the property and they slowed from-they loaded about 24 boxes in a matter of an hour and a half to two hours. But later on that night after we told them that they were going to be barred, and then when they seen that, you know, the severity of what was about to happen, everybody loaded 80 boxes in an hour and a half.

Nunnery further stated that he had not observed what had occurred throughout the day since he did not arrive at the facility until about 7 p.m. that evening, but when he got there and was riding around the property he could tell that Neilan was "rolling at a very slow speed." Nunnery testified that he approached Neilan and informed him that "the Railroad wanted us to go around and tell everybody to knock it off. If the train's late they're going to be barred." Nunnery asserted that this was pursuant to instructions from the Railroad. Neilan's response, as Nunnery testified, was that he didn't know what he was talking about.

Nunnery was then cross-examined by Neilan, who asked him whether he had, in fact, told the men at the meeting on the prior evening to stop at "every single crossing and obey every single safety rule." Nunnery's response was as follows:

> What I told you to do is, when you said, "Hey, are you sure this is what you want John? The work's going to get really slow." I said, "I don't care. Just follow the rules. I'm not go-

ing to not bend the rules so that we-so that you can violate safety rules for productivity." So I did say I don't care.

Nunnery then stated that Neilan reiterated whether Nunnery was sure of what he wanted because it would "get really slow out there," and Nunnery again stated that he could not "jeopardize safety for productivity."

Neilan asked Nunnery what bosses had observed him working slowly all day long and he responded that Newcomb and Oliphant had. Neilan noted that the company attorney had attributed the slowdown as starting prior to his start time.

In response to the hearing examiner's question about what time was the train due to be released, Nunnery responded: "It's an outbound train that's to be loaded out, and we had been releasing, and our company goal was 7:00. The absolute latest it can be released is 9:00. We had been releasing it at 7:00 each evening."

Neilan testified that he did not participate in a work slowdown, as alleged. He further testified that the facility was five men short that day; that during the safety meeting on the prior evening employees were told to "obey every safety rule there is." Neilan continued:

> And there are many crossings in the yard, and according to the Railroad rules you're supposed to stop at every crossing. This was never done before. Everybody would just drive through the crossings and try to make time.
>
> Mr. Nunnery came down and said he doesn't care about the productivity; he wants to have all of these safety rules obeyed. He's going to have problems with Mr. Scacco on the Railroad if these safety rules aren't obeyed.
>
> And what we were telling them in the meeting is "John, if we have to stop at every crossing its's going to take—make the job—longer to do. I've been doing this going on 17 years at this company, and I did it at another company before that. We just want to get the job done safely and efficiently." Those are my exact words I said to him.
>
> He said, "I don't care. You got to do—you got to stop and you got to obey all the rules. You got to wear your seatbelt. You got to wear your hardhat. And you got to wear your safety glasses; all your personal protection." I said, "I don't have a problem doing that. But stopping at these crossings is going to slow the work down."

Neilan then went on to tell the hearing examiner that there were seven or eight crossings where one had to stop throughout the yard; that for years the employees would go through these crossings without stopping because they could be 40- to 50-feet apart and it would add a lot of time to the job. Neilan claims that he tried to express this to Nunnery.

Neilan claimed that Nunnery and Newcomb told him at about 7:30 p.m. that if it was found that there had been a slowdown, he could be barred from the property. After that, he did not stop at the crossings.

In addition, Neilan claimed that the low number of boxes cited by Nunnery was due to the fact that they were empties and therefore not counted until the end of the night when the programmer records them.

When asked why he did not file a grievance with the Union, Neilan asserted that he had but "he [the union secretary] didn't seem to be all that interested . . . so we went and took it to the Labor Board."

III. ANALYSIS AND CONCLUSIONS

Summary of the Contentions of the Parties

As noted above, the General Counsel contends that Neilan, Ventre, Gonzalez, and Martinez were unlawfully suspended and thereafter discharged because of their protected concerted activities. It is contended that the alleged work slowdown and service failure were pretext for the discharges and that any work-related difficulties stemmed from a lack of manpower and poor supervision including the timing of lunchbreaks and decisions as to how to staff the crews. The General Counsel further relies upon representations by H&M that the four employees were terminated because they were barred by NS, when in fact they were not barred until after their terminations were effectuated. It is argued that the 23Z was, in fact, not released late on December 13 and that the four employees in question were merely following instructions they had been issued on the prior evening.

Counsel for the General Counsel further argues that the alleged threat to reinstate the disciplines of Martinez, Watts, Wilson, and Henriquez, the reinstatement of the written warning to Vicente, and the threats to discharge Martinez and Neilan are further evidence of the Employer's animus and further constitute independent violations of the Act. It is further argued that Scacco acted as an agent of H&M when he issued threats to employees and that these threats constitute additional evidence of animus toward their protected, concerted activities.

Counsel for the General Counsel further argues that the Union conducted a perfunctory and bad-faith investigation into the events of December 13 and unlawfully failed and refused to process the grievances of Neilan, Ventre, Gonzalez, and Martinez relating to their suspensions and eventual discharges.

H&M argues that any protected, concerted activities in which the four employees may have engaged is too remote in time to provide a nexus between these activities and their discharges or establish that they were a motivating factor in H&M's determination to discharge them; that any evidence of animus which the General Counsel cites cannot and should not be credited or relied on and that the four employees engaged in a partial strike which is unprotected under the Act and further violates the "no slowdown" provision in the collective-bargaining agreement for which they were lawfully discharged.

The Union contends that the Domini diligently processed grievances and represented the bargaining unit throughout the fall of 2012, after the new management took over; and there is no evidence of bad faith on the part of the Union generally, or Domini in particular. The Union further contends that the General Counsel has failed to prove that the Union conducted itself in a perfunctory manner, and that the evidence shows it conducted an investigation into the discharges based upon the information provided to it by both the Employer and the employees. The Union further argues that the failure of the four employees to cooperate with the Union's investigation of the rea-

sons for their discharges is fatal to the General Counsel's claim that the Union breached its duty of fair representation.

The discharges of Neilan, Ventre, Gonzalez, and Martinez

Applicable Legal Standards

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) and (1) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer's decision was the employee's union or other protected activity. *Pro-Spec Painting*, *Inc.*, 339 NLRB 946, 949 (2003). The General Counsel satisfies an initial burden by showing that (1) the employee engaged in union or other protected activity; (2) the employer knew of such activities; and (3) the employer harbored animosity towards the union or other protected activity. *American Directional boring, Inc. d/b/a ADB Utility Contractors, Inc.*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds 383 Fed. Appx. 594 (8th Cir. 2010); *cast-Matic Corp. d/b/a Intermet Stevensville*, 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council of Riverbay Coommunity, Inc.*, 330 NLRB 1100, 1105 (2000); *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). Unlawful motivation may be demonstrated not only by direct evidence, but by a variety of circumstantial evidence such as timing, disparate, or inconsistent treatment, departure from past practice, and shifting or pretextual reasons being offered for the action. *Fresh Organics, Inc., d/b/a Real Foods Co., a wholly-owned subsidiary of Nutraceutical Corp. & Nutraceutical Corp.*, 350 NLRB 309, 312 fn. 17 (2007); *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011). In addition, proof of an employer's animus may be based on other circumstantial evidence, such as the employer's contemporaneous commission of other unfair labor practices. *Amptech, Inc.*, 342 NLRB 1131, 1135 (2004). If the General Counsel meets its initial burden, the burden of persuasion then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. Thus, employer may defend by proving by a preponderance of the evidence that it would have taken the adverse action even in the absence of the employee's union activity. See, e.g., *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra; *Consolidated Bus Transit, Inc*., supra.

Protected Conduct

To be protected under Section 7, employee activity must be both "concerted" in nature and protected either for union-related purposes or for "mutual aid or protection." Discipline issued because of an employee's activities as a shop steward or in processing grievances, policing a collective-bargaining agreement or engaging in other union activities is unlawful. See e.g. *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028 (1976). In a similar vein, other employees who participate in grievance processing, addressing collective-bargaining concerns to management, and negotiations engage in conduct that is "indisputably protected." *Valley Hospital Medical Center*, 351 NLRB 1250, 1259 (2007).

In *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984), the Supreme Court gave its approval to the Board's *Interboro* doctrine,[41] which, in general terms, states that it is a Section 7 right for an employee to assert rights conferred on him and his fellow employees through a collective-bargaining agreement. In this regard, the court held that, an employee's invocation of a right rooted in the collective-bargaining agreement is an integral part of the collective-bargaining process and is therefore a "concerted" activity, even though the individual employee may not have cited the collective-bargaining agreement or stated that he or she was acting on behalf of himself or herself as well as other employees. Moreover, an individual employee attempting to enforce a contract right, even if mistaken about such rights, is engaged in protected activity as long as he or she acts with a reasonable belief that the right is actually conferred under the contract. *City Disposal*, supra at 835, 836, 840, 841. See also *Crown Zellerbach Corp*., 284 NLRB 111, 112 (1987).

Complaints about health and safety conditions at work are also considered protected under the Act even when registered individually, as they inure the benefit of all. *Alleluia Cushion Co., Inc*., 221 NLRB 999 (1975). In addition, an individual complaint may be considered concerted in nature even though not "specifically authorized" when it is a "logical outgrowth" of concerns raised by the group. *Mike Yurosek & Son, Inc*., 310 NLRB 831 (1993). See also *Covanta Bristol, Inc*., 356 NLRB 246 (2010).

Here, beginning in the fall of 2012, when the new management assumed control of the Croxton yard, there were frequent conflicts and employee dissatisfaction with the attempt to initiate or enforce work rules and Neilan contacted Domini on a frequent basis. As noted above, these resulted in grievance meetings with a Federal mediator and involved H&M upper management. Ventre participated in these meetings as well. Additionally, there is witness testimony to the effect that Ventre and Gonzalez acted in Neilan's stead when he was not available.

Applying the above standards, generally speaking, the evidence reflects various instances of protected conduct occurring in the months prior to the discharges of Neilan, Ventre, Gonzalez, and Martinez.

As background, it is not disputed that Neilan had acted as a shop steward since 1999 and participated in contract negotiations for every contract from 1996 up until the year of his termination. Ventre had also participated in contract negotiations for each contract since his hire; Gonzalez had participated in the negotiations for several contracts and Martinez, who was out on disability during the most recent negotiations had been a member of prior negotiating committees as well.

As noted above, employees communicated their unhappiness about the enforcement of new policies and work rules frequently. There is little dispute that such complaints resulted in union discussions with H&M management several times a week.

[41] *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

There are also specific instances where the employees in question sought to use the Union's grievance processes, or to otherwise advocate for each other with regard to terms and conditions of employment, as follows:

On September 6, there was a grievance meeting regarding Pimentel, which Neilan and Domini attended. As noted, a settlement of this matter was reached and Pimentel continued his employment.

In mid-September, Neilan, Gonzalez, and Ventre, accompanied by Domini, attended a meeting to address what was perceived to be a series of violations of the collective-bargaining agreement. As discussed above, these matters were eventually grieved. Their resolution is discussed below.

On September 19, Neilan filed an unfair labor practice charge on behalf of himself and Vicente; conduct which is indisputably protected under the Act.

On September 25, as a result of complaints lodged by Neilan, he attended a meeting with Domini, Newcomb, and Nunnery about various contract issues including flextime.

On October 3, as a result of grievances filed by Neilan and prosecuted by Domini, a mediation session was held and both Neilan and Gonzalez were awarded overtime pay for alleged contract violations regarding the assignment of overtime on September 22.

On October 9, as a result of the new shift schedule to become effective on October 15, Neilan insisted to Nunnery that any weekend overtime should be bid and awarded by seniority as arguably provided for in the collective-bargaining agreement and by virtue of past practice.

On October 24, Neilan, Ventre, Gonzalez, and Martinez all represented the unit in a meeting with Nunnery and Newcomb where disputes over shift hours, breaktimes, and lunchbreaks were negotiated after H&M management asked employees to sign off on newly implemented rules. It is worthy of note that, at this time, they sought the assistance of the Union and Domini participated in this meeting as well. As a result of these actions, an understanding was reached regarding matters such as shift duration, rules regarding lunchbreaks, early departure, overtime pay, and procedures for leaving the work area, among others.

Gonzalez made health and safety complaints in September and November 2012, regarding the safety of a new bridge installed by NS broken sanitary conditions to the Union.[42]

On December 1, Martinez made specific reference to the "solidarity" of the work force when, in response to requests that he and Neilan work more than 4 hours on an overtime shift, he told Nunnery: "[T]hat's the way in the contract-it's a four hour shift; we're all union here-we stick together."

On December 2, Neilan participated in a meeting with Newcomb, Nunnery, and other employees who had been asked to work beyond 12 hours in spite of their protestations that such work assignments were onerous.

On December 3, Domini and Neilan then met with Newcomb and Nunnery to attempt to resolve the dispute about the length of time employees could be held over for overtime. Nunnery admitted at this meeting that the 16-hour rule he had claimed to have the right to invoke was not a written policy. Again, the invocation of rights under the collective-bargaining agreement and the Union's assistance in this matter relating to terms and conditions of employment is concerted and protected under the Act.

On December 12, at the so-called "safety meeting" described above, Ventre and Gonzalez made a specific proposal that the senior members of the bargaining unit would seek to enforce the Employer's rules regarding seatbelts and PPE in exchange for the rescission of warning notices for four employees. Neilan agreed to assist in the rules' enforcement as well. Such action, inuring to the benefit of coworkers, also comes well within the ambit of protected conduct under the Act.

Further, it cannot be disputed, as has been set forth above, that Neilan, Ventre, Gonzalez, and Martinez were among the most senior employees and viewed as leaders by H&M and NS management as well as by their colleagues. Their "union" affiliation did not go unnoticed as was made evident when Nunnery explained to Scacco that H&M's failure to report the accident on December 13 was due, in part, to so-called "union issues" that districted Oliphant and the rest of the team.

Employer Knowledge

Respondent has argued that the General Counsel has failed to meet its burden to show that Newcomb, as the acknowledged decisionmaker in this case, had any knowledge of many of the actions claimed to constitute concerted, protected conduct or evidence of the Employer's animus toward that conduct. In particular, it is claimed that Newcomb was unaware of details pertaining to negotiations for a successor contract in 2012; the settlement of the Pimentel grievance; claims about violations of the overtime policy; negotiations regarding flextime scheduling; disputes about overtime shift policies; the meeting with Scacco and its contents and discussions surrounding the safety meeting, among other matters. Such contentions elevate form over substance; and misapprehend both the facts and the law.

As discussed above, while Newcomb was not a continual presence at the site, he had a vested interest in observing and receiving reports as to what was occurring there. It strains credulity that Newcomb would not have been made aware of the difficulties his local managers were having in enforcing the Employer's priorities, policies, and procedures. In its posthearing brief, Respondent spent much time touting his credentials in turning around facilities deemed to be under par. To contend that he remained ignorant of the labor difficulties the facility was experiencing belies all of those contentions.[43] Newcomb also spoke with his subordinate managers prior to discharging the men.

[42] Art. 5 of the CBA provides that the Employer shall keep its premises "in a clean and sanitary condition."

[43] In particular, in its posthearing brief, Respondent relies upon testimony adduced to the effect that Newcomb was, "an individual who had worked for H&M for 9 years and who specialized in getting new operations up and running, and also fixing operations that were not performing to acceptable standards." As he testified, Newcomb had completed turnaround assignments in three other H&M facilities. Once NS issued its ultimatum, Newcomb headed the turnaround team at Croxton.

Newcomb (and, as will be discussed in further detail below Nunnery and Bartee), as agents of the Respondent, are liable for their actions, and such actions are imputable to H&M.

"A principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent . . . it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted." *Bio-Medical Applications of Puerto Rico, Inc*., 269 NLRB 827, 828 (1984). See also *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1337 (2004). Moreover, "[T]he principal is affected by the knowledge which the agent has when acting for him" Restatement 2d Agency § 278. "A person has notice of a fact if his agent has knowledge of the fact, reason to know it or should know it, or has been given a notification of it, under circumstances coming within the rules applying to a liability of a principal because of notice of his agent." Restatement 2d Agency § 9(3).

In any event, the evidence is clear that most of the conduct that I have found to be protected and concerted involved at least one, and frequently more, H&M manager and frequently involved the Union in negotiation, arbitration, or mediation. Employer knowledge of such activities is apparent, and cannot reasonably be disputed.

Evidence of Animus

Some of the evidence proffered by the General Counsel regarding animus here is based on testimony I find unreliable due to its inherent improbability or lack of corroboration. In addition, the counsel for the General Counsel relies heavily on suggested inferences and what it asserts are pretextual reasons offered for the discharges. However, the record additionally contains what is, given the context, some direct evidence of animus toward the employees' concerted, protected activity. And, the record further supports some inferences of animus from apparent pretext, but not to the extent suggested by counsel for the General Counsel.

As an initial matter, it does not appear subject to dispute that H&M management experienced a "push back" to their attempts to either enforce or initiate new work rules, and that this created difficulties for them. Nunnery conceded that every time he came up with a memo or new policy, Domini had to come down and he would be obliged to hold a meeting and that these were frequently "heated."

Neilan testified that at a meeting on September 25, which I have concluded reflected concerted, protected conduct, Newcomb asked Neilan whether he wanted the Company to go out of business; whether Neilan was there for the men or for himself; and further stated that Connors "had a problem" with him (Newcomb denied similarly having a "problem" with Neilan). Both Neilan and Ventre testified that this sentiment was later echoed by Scacco and I credit such testimony.

When Gonzalez reported the broken sanitary facilities to the Union, Nunnery characterized his actions as a "threat."

When employees concertedly complained about having to work more than 12 hours in one shift, Newcomb characterized them as purported "tough guys" and vaguely warned them to "wait 'til tomorrow" when he would have to "do what he had to do."

When Neilan met with H&M management about the foregoing incident, he was told that he would be responsible for booking manpower—clearly not within the scope of his job responsibilities and an apparent expression of frustration over the employees' unwillingness to work more than 12 hours on any given shift. As Neilan testified, Newcomb stated that Neilan was the problem and he objected to everything that management tried to do. Although Newcomb and Nunnery denied that these precise words were used, Nunnery did testify that the "gist" of the conversation was that everything management tried to do was "kicked back against" or "met with resistance," that it was "always a battle" and that nothing was easy.

In a similar vein when management distributed a series of work rules in October, Gonzalez' questioning of these rules, his attempt to relate them to the extant collective bargaining, and his comments that changes had to be negotiated with the Union prompted an angry response from Oliphant and a subsequent discussion with Newcomb (in which both Neilan and Ventre participated) in which Newcomb asked why the men kept on "fighting."

In this regard, I further find the fact that new work rules were posted immediately after the suspensions of the discriminatees, some referencing heightened disciplinary consequences, to be instructive, and indicate animus to the "resistance" offered by the senior men and outspoken union adherents, and a sense that once they were no longer on the scene management could proceed.[44]

After the events of December 13, Nunnery attributed H&M's failure to timely report the on-site which had occurred that day to difficulties stemming from the accident itself as well as to "union" (rather than productivity or work slow down) issues.

Moreover, it is well settled that a finding of discriminatory motivation may also be predicated on circumstantial evidence including pretextual reasons for a personnel action. See, e.g., *Suburban Electrical Engineers/Contractors, Inc.*, 351 NLRB 1, 5 (2007) (and cases cited therein).

Shortly after the discharges, Gonzalez was summoned to a meeting also attended by Nunnery, Oliphant, and Bartee where he attested to the fact that the slowdown on December 13 was due to manpower issues, crane problems, and compliance with

[44] By contrast, counsel for the General Counsel reiterated in his brief that Respondent's animus can be inferred from "numerous unilateral changes and contract violations" which occurred in the period prior to the discharges. While counsel for the General Counsel makes such assertions, it also acknowledges that such infractions are neither alleged nor proven. They certainly were not litigated as such at trial. It is the case as set forth above, that in October 2012 employees were asked to review and sign an acknowledgement relating to certain work rules. As Neilan testified, certain of these policies reflected the current practice, others were set forth in the collective-bargaining agreement but enforcement had lapsed and two policies were, to his estimation, new. He signed off on all of the policies except the latter two. For the foregoing reasons, I decline to make a finding regarding "numerous unilateral changes and contract violations" allegedly occurring prior to the suspensions and discharges here as urged by counsel for the General Counsel.

the safety rules. His testimony that he was told that he could keep his job if he said the "right thing" was unrebutted by any of these managers who all testified at the hearing and I credit it. Such evidence suggests pretext.

I additionally infer animus from the pretextual rationale offered by Nunnery during his sworn testimony at Neilan's unemployment hearing where he asserts that H&M was compelled to discharge the men because they had been barred from NS property. In fact, while I also have serious doubts about the credibility of the testimony offered by Neilan, as discussed below, for purposes of the immediate discussion, the bulk of the record evidence indicates that the discharge decision was undertaken by H&M. In fact, Newcomb testified that NS had no role in his determination and that the decision to terminate the employees emanated from him. NS barred the men only after the decision had been made to terminate their employment.

I further infer pretext from the conflicting accounts of the "slowdown," its timing and the testimony of the managers who allegedly observed such matters. However, this will be addressed in further detail below where I discuss what occurred on December 13 as part of Respondent's asserted defense to the allegations of the complaint.

Accordingly, based upon the foregoing, I find that the General Counsel has met the prerequisite elements of a prima facie case to establish that the discharges of Neilan, Ventre, Gonzalez, and Martinez were in violation of the Act. The burden thus shifts to H&M to show that they would have discharged these employees irregardless of or notwithstanding their protected conduct. Although, as noted above, I have found any number of witnesses herein to be less than credible in certain aspects of their testimony, as the burden of proof under *Wright Line* has shifted to H&M, the credibility of their witnesses comes into question at this point.

H&M's Asserted Defenses

H&M has argued that any concerted, protected activity engaged in by the men was so remote in time as to rebut any evidence or inference of animus and render it irrelevant to its legitimate discharge decision. In this regard, H&M cites a series of cases including *Qualitex, Inc*., 237 NLRB 1341, 1343–1344 (1978), where it was noted that there are times when the Board will not presume antiunion animus from the timing of an employee discharge. In that case, the employer discharged an employee with significant union activity approximately 4 to 5 months after a union election where it had vigorously opposed the unionization of its employees. Relying, in part, on the passage of time, the Board declined to find discriminatory intent or sufficient antiunion motive. Similarly, in other cases cited by Respondent, the passage of time has been found to be sufficient to either negate the proof or inference of a nexus between the protected conduct and any animus that the evidence might suggest. See *Central Valley Meat Co*., 346 NLRB 1078, 1079 (2006) (adverse action which occurred over 6 months after employee's union activity was too remote in time to constitute a causal connection); *Chrysler Credit Corp*., 241 NLRB 1079 (1979) (concerted letter writing campaign occurring 8 months prior to discharge and deficiencies in performance were well documented by supervisor).

Here, however, in contrast to the cases relied on by H&M, we have an ongoing pattern of concerted conduct beginning shortly after new management came to the facility up to and including the period immediately prior to the discharges, rather than any particular discrete incident or series of incidents which only remotely relate to a particular event.

H&M has further argued that its various actions in attempting to make its operations more productive and enforce its work and safety rules fails to show animus to protected conduct.[45] I cannot disagree with this contention as a general matter. That is not the issue however: the question is whether employees' resistance to such efforts, as well meaning and understandable as the Employer's concerns may have been, constitutes protected conduct and whether the Employer stepped over the line in its response to such conduct.

After closely examining the record, I have determined that the weight of the credible evidence demonstrates that H&M has not met its burden under *Wright Line*, supra.

As noted above, H&M has contended that the four discriminatees engaged in an unauthorized work slowdown in contravention of the collective-bargaining agreement and the Act. In this regard Respondent argues that deliberate slowdowns, work-to-rule and inside game tactics are not considered protected under the Act because they are considered unlawful partial strikes, and has cited numerous cases in its brief in support of this proposition. See, e.g., *Daimler-Chrysler Corp*., 344 NLRB 1324, 1325 (2005), and cases cited therein. See also *Elk Lumber Co*., 91 NLRB 333 (1950). H&M further contends that this same reasoning has been applied to cases where an employee engages in an unauthorized slowdown in violation of a "no-slowdown" provision in the collective-bargaining agreement. *Midwest Precision Castings Co.*, 244 NLRB 597, 598 (1979). Here, H&M argues that the discriminatees acted in violation of article 12 of the collective-bargaining agreement which provides:

> [D]ishonesty, defective work, chronic lateness, gambling, chronic absenteeism, excessive chargeable accidents, unauthorized slowdowns and insubordination shall be deemed cause for dismissal.

In support of the foregoing contentions H&M relies upon statements by the discriminatees that they did not like or did not agree with the safety rules. In particular, Neilan testified that he did not like the seatbelt rule because it slowed things down; Gonzalez testified that the rule was a nuisance. Neilan testified that he told Nunnery that some of the PPE requirements were nonsense. H&M also relies upon Oliphant's testimony that when he spoke with Neilan about the slow pace of work on December 13, Neilan replied that if Oliphant would allow employees not to wear the seatbelts, they would get the trains out on time. In a similar vein Bartee testified that Neilan told him that he was moving slowly because of the seatbelts and if they didn't have to use them the work would move faster. Ventre

[45] In this regard, H&M has argued that its efforts to save its contract with NS inured to the bargaining unit as a whole.

complained that it took forever to put the seatbelts on. Newcomb testified that Neilan said their pace of work was due to the fact that the Company insisted they wear seatbelts.

H&M also relies on Domini's testimony that Neilan complained to him about having to wear safety equipment and the seatbelt policy. Domini also testified that Neilan said that if the Company wanted them to be safe, they would be "extra safe."

H&M contends from the foregoing, that it is evident that the discriminatees' motivation for altering their work practices on December 13 was retaliation for H&M's enforcement of safety rules they had not previously been required to observe.

H&M further argues that the discriminatees engaged in uncharacteristic workplace conduct that adversely affected their work performance on December 13. For example, it was generally admitted that the normal practice at Croxton was to drive the hostler trucks as fast as they could go and proceed with caution at crossings. A number of employees testified that on December 13 drivers limited their speed to 15 mph and chose to stop at all crossings. Neilan admitted that he did so, and he observed others doing the same. Gonzales testified that he drove slower than top speed and stopped at all crossings. Vicente testified that he observed Neilan and Ventre stopping at every crossing and DeJesus testified that he saw some employees stopping at every crossing on December 13.[46]

H&M argues that these deliberate acts were intended to push back and hurt the Company and resulted in a service failure by virtue of the late release of the 23Z.

Here, I have concluded that the credible evidence on whole shows that employees were indeed working more slowly on December 13; in particular by driving at a speed less than usual and by stopping at every crossing. I additionally find that Nunnery did not directly order the men to do that, as has been contended.[47] Rather, I have concluded that, in the service of enforcing other safety rules, Nunnery stated that the men could drive more slowly and stop at crossings if they felt they needed to do so to be safe, but reiterated that they should use "common sense." It is apparent from the audiotape, the transcript and his admissions at the hearing, as well as the credited testimony of other witnesses, however, that Nunnery, as the terminal manager, did acquiesce in, and may well have been construed as endorsing the use of these practices, although it is also apparent that he did not agree they were necessary. As it is clear he is an agent of H&M, the Company is bound by his representations to its employees. "A principal is liable for his agent's actions, even if the principal did not authorize or ratify the particular acts." *International Brotherhood of Electrical Workers Local 98, AFL–CIO (MCF Services)*, 342 NLRB 740, 742 (2004), enf. 251 Fed. Appx. 101 (3d Cir. 2007). "If such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent . . . it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted" *Tyson Fresh Meats*, 343 NLRB at 1337.

I further find, however, for the reasons discussed below, that the managers' various descriptions of the nature and extent of the conduct (or alleged misconduct) exhibited by the discriminatees on this day is not credible. And, the evidence otherwise fails to show that they would have been discharged if not for their concerted, protected conduct, as outlined above.

As an initial matter, I find that Nunnery cannot be relied on as a reliable witness. Under initial questioning by counsel for the General Counsel, he denied discussing the issue of speed limits and stopping at crossings at the December 12 safety meeting. When confronted with the audiotape of his comments, however, Nunnery was compelled to admit that these matters had been discussed.[48] During Neilan's unemployment hearing, Nunnery told the examiner in sworn testimony that H&M discharged the men because they had been barred by the railroad; however, the bulk of the credible evidence shows that they were barred only after H&M determined to discharge them. Moreover, the record additionally shows that Nunnery misrepresented the nature of what occurred during the safety meeting to his own colleagues and superiors when he emailed them that warning letters had been issued to all those involved.

Similarly, I discount the testimony offered by Bartee regarding his observations after he arrived at the facility at or after 7:30 p.m. on December 13. Although Bartee testified that he observed Neilan and the others working at an uncharacteristically slow pace, other evidence from H&M witnesses contradicts this and, in fact, both Newcomb and Nunnery admitted that after about 7:30 p.m. the pace of work sped up. Therefore, Bartee was not in a position to make a meaningful evaluation of whether the men had engaged in a slowdown, as alleged. I therefore conclude that his testimony is pretextual and constitutes some evidence of unlawful motive.

Although Newcomb testified and Respondent asserts in its posthearing brief that Oliphant began noticing the slow pace of work in the morning of December 13, Oliphant testified that he did not notice anything in particular until about midafternoon.

[46] Respondent further argues that employees selectively observed only those safety rules that they knew would adversely influence productivity. For example, Neilan and Ventre both used cell phones while on duty and Neilan operated his truck with a broken safety belt.

[47] I do not find, as the General Counsel contends in its posthearing brief, that Nunnery issued "clear instructions" to employees to limit their speed to 15 mph and stop at every crossing. I further discredit Neilan's testimony to such effect which was given at his unemployment hearing.

[48] Respondent argues that the recording of this safety meeting and the transcript of it are not properly admissible as a foundation for their admissibility has not been properly established. In support of these contentions, Respondent relies on standards enunciated by the Third Circuit as set forth in *U.S. v. Starks*, 515 F.2d 112, 121 fn. 11 (3d Cir. 1975) (establishing a 7-factor test for admissibility); see also *U.S. v. Adames*, 509 Fed. Appx. 176, 178 (3d Cir. 2013). However, as I noted at the hearing in this matter, the standard for admissibility of an audio recording under Board law is a more lenient one. See *Wellstream Corp*., 313 NLRB 698, 711 (1994); *East Belden Corp*., 239 NLRB 776, 782 (1978). In any event, it is clear that Nunnery admitted making the remarks recorded on the audiotape and neither he nor Bartee, who was also present, offered any evidence to establish that he did not. These admissions were made during his cross-examination; and the General Counsel was certainly within its rights to confront him with these prior statements to determine whether they were in fact made; in particular since he had initially denied making the comments heard on the tape. Thus, in my view, the issue of the admissibility of the tape is somewhat of a red herring.

Newcomb testified that on December 13 he observed each of the discriminatees driving between 3 and 5 mph, stopping at every crossing regardless of whether there was a stop sign, sitting idle for almost 30 seconds after hooking up to a container, and taking almost 10 minutes to pull a chassis to the train, longer than it should have taken.

I fail to credit the testimony of Nunnery and Newcomb that they observed the men driving at the pace of 3 to 5 mph. I further do not credit Newcomb's general characterization of how the discriminates behaved. It is contradicted by other evidence, including the testimony of current employees and, moreover, is inherently improbable. If all four employees had been driving that slowly, and working at such a deliberately obstructive pace, very little would have been accomplished prior to 7:30 p.m., the time at which the men resumed their normal operations. Such conduct would have, by necessity, also impeded the work of other employees. But the evidence shows that other trains were loaded and unloaded prior to this time. Moreover, I conclude that if that much of a slowdown had occurred, Oliphant would have noticed it earlier in the day and it stands to reason that such uncharacteristic conduct would have been apparent to the NS personnel who were present at the facility as well.[49] There is no evidence that any of these NS managers independently noticed a slowdown on that day or were aware of it prior to receiving communications to such effect by H&M personnel.

I further rely, to a limited extent, upon the testimony of current employees Vicente, Barrett, and DeJesus, to the extent they have a specific recollection relating to the pace of work that evening. The Board has long held that the testimony of current employees which is adverse to their employer's interests has inherent reliability. See *Advocate South Suburban Hospital*, 346 NLRB 209, 209 fn. 1 (2006) (quoting *Flexsteel Industries*, 316 NLRB 745 (1995); *The Avenue Care and Rehabilitation Center*, 360 NLRB No. 24, slip op. at 1 (2014) (current employment status may serve as a "significant factor" upon which a judge may rely in resolving credibility issues. At the hearing, Vicente blamed the slower pace of work on crew size, which he claims to have told Oliphant when asked. Although Oliphant generally denied that crew size was an issue on that day, he did not specifically deny having a discussion to such effect with Vicente. DeJesus testified that he did not see anyone deliberately slowing down, although he did tell Domini that he saw men making full stops at the crossings. He denied seeing anyone driving slowly and insisted that they were driving normally. I do not credit this aspect of his testimony, however, as it is essentially unrebutted that there were certain employees driving more slowly than the speed at which they usually drove. Barrett's testimony is subject to question in certain aspects due to the limited nature of his recollection and his admission to confusion. Barrett did testify with particularity, however, that at some point prior to his lunchbreak he was left with three drivers on his crew and that affected productivity due to the fact that he had to wait for the men to unload. He further testified that after his lunchbreak, once the size of his crew increased, he was able to get more work done, and I credit his testimony in this regard.

I further find that, although there was a service failure on December 13, and this was obviously of concern to H&M, this was hardly a unique circumstance. There had been numerous occasions where this particular train—the 23Z—had been subject to a late release in prior months. On several occasions, the train was released far later than it was on December 13. There is no evidence that any employee had or has since been disciplined, let alone discharged, for any instance of a late release. Moreover, as noted above, the Employer maintains a progressive discipline system, which was not utilized under these circumstances. It is well established that differences in the treatment of employees who commit the same or similar offenses is an important factor to be considered in evaluating a respondent's defense. *Central Valley Meat Co.*, 346 NLRB 1078, 1079 (2006). Such disparate treatment indicates a discriminatory motive. As does the immediate posting of a new series of work rules immediately after the four men were put on suspension.

For the foregoing reasons, I conclude that H&M has failed to show, by a preponderance of credible evidence, that Neilan, Ventre, Gonzalez, and Martinez engaged in the sort of misconduct as alleged and, further that they would have been discharged for their actions on December 13 irregardless of their protected, concerted conduct.

Scacco's Alleged Agency Status

At the hearing, the General Counsel amended the instant complaint to allege that Scacco is an agent of H&M, and so argues in its posthearing brief. An employer's liability under the Act for the conduct of another is, under Board law determined in accordance with the principles of the law of agency. "The crucial and determining factor in the establishment of an agency relationship concerns the authority of the alleged agent to act as an agent in a given manner for the alleged principal." *Alliance Rubber Co.*, 286 NLRB 645, 648 (1987). "Authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." *Wometco-Lathrop Co.*, 225 NLRB 686, 687 (1976), citing Restatement 2d Agency § 26 (1958). In determining what constitutes apparent authority, the Board applies the standard endorsed in *Dentech Corp.*, 294 NLRB 924, 925 (1989). See also *Dick Gore Real Estate*, 312 NLRB 999 (1993). In *Dentech*, the Board, quoting from *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988), described apparent authority in the following manner:

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. (Citations omitted.) Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such a belief. (Citation omitted). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent

[49] Gause was present during the afternoon; Scacco was there from 6 a.m. to 5 or 6 p.m. and Martins replaced him for the night shift.

of the authority granted to the agent encompasses the contemplated activity.

The burden of proving the existence of an agency relationship rests with the party asserting the relationship, in this case, the General Counsel. *Oakwood Healthcare Inc.,* 348 NLRB 686, 687 (2006)*; Pan-Oston Co,* 336 NLRB 305 (2001). In my view, the General Counsel has not met its burden here.

The General Counsel produced no specific evidence as to how Scacco might have been held out by H&M as its agent. There was no evidence adduced that would indicate that Scacco was speaking on behalf of H&M when he spoke with employees. Rather, the evidence shows that Scacco was an independent actor representing the concerns and priorities of NS when he met with employees and the remarks credibly attributed to him by witnesses for the General Counsel were allegedly made. The General Counsel has adduced no evidence to suggest that he stepped out of that role or that Scacco was explicitly or implicitly authorized by H&M to speak or act on its behalf on matters outside of and unrelated to his normal business functions. Nor has it been shown, since the new management's arrival on the scene, that H&M, either through word or deed, conveyed to its employees that Scacco was authorized to speak for H&M management on employment or union matters. To the contrary, the record demonstrates that the day-to-day management of personnel was left to H&M, and employees knew this to be the case.

The mere fact that NS and H&M have overlapping business priorities, which included having an efficient and productive work force is, in my view, insufficient to establish agency status under the standards described above.[50] Moreover, I find that the evidence relied on by the General Counsel regarding Scacco's so-called "threats" to employees is largely uncorroborated by other employees attending the meeting. In particular Neilan's and Gonzalez' testimony is subject to doubt as their individual accounts of remarks attributed to Scacco were not corroborated by any of the other employees present. I find that these sorts of comments, had they been made, would have been something other employees would have tended to recall.[51] Accordingly, I discredit such testimony.

The Alleged Threats of Discharge

With regard to this specific allegation of the complaint, the context must be remembered. Although there is a litany of allegations regarding protected, concerted activity in the complaint, the General Counsel has neither alleged nor proven that the conduct engaged in by Neilan, Ventre, Gonzalez, and Martinez on December 13 was similarly protected and concerted under the Act.

The General Counsel has alleged that Newcomb and Nunnery unlawfully threatened Neilan and Martinez with discharge. In particular, counsel for the General Counsel relies on Nunnery's admission that he told employees that Scacco "wanted us to tell anyone that's involved with slowing down out there to knock it off, if they didn't knock it off, he was going to ban them. If the train was late he was going to ban them off the property." Gonzalez testified that Newcomb told him that if the railroad became involved, he would not be able to help the workers. Martinez testified that Newcomb told him that if the train was late that evening, he "wouldn't be there anymore." Neilan testified that when he first spoke with Newcomb that evening at about 7:30 p.m., Newcomb said, "If this train is not out of here by 9:30, you and the men are going to be barred from the terminal." Newcomb denied making the statements attributed to him by the employees, and provided alternate versions of these conversations.

In any event, even assuming Newcomb and Nunnery made the comments attributed to them, I cannot conclude that they violated the Act as alleged. All of these comments related to a perceived slowdown in work, which did in fact occur (although not to the extent alleged by H&M), was limited to the events of December 13 and referred to the possible anticipated consequences of a late release of the 23Z. The conduct referred to by the managers did not encompass any other conduct which I have concluded was concerted and protected. The fact that these employees may have subsequently been discharged for discriminatory reasons does not necessarily render their supervisor's comments pertaining to adverse consequences from the perceived slowdown to be discriminatory. Accordingly, I recommend dismissal of this allegation of the complaint.

The Alleged Threat to Reinstate discipline

Neilan testified that at about 7:45 p.m. both Nunnery and Newcomb approached him and Newcomb told Neilan that he was causing good men to lose their jobs. Then, as Neilan testified, Nunnery said that he would reinstate all the writeups he threw out on the prior evening. Nunnery did not specifically deny making such comments; however, he provided an alternative account of their discussion.

Assuming such comments were made, the record suggests that they were in response to a perceived slowdown of operations, as set forth above. As has been noted above, the General Counsel has not alleged that these actions which occurred on December 13 fall within the realm of protected, concerted activity under the Act. Accordingly I do not conclude that any such threat, if made, was in violation of the Act.

The Reinstatement of Vicente's Discipline

The General Counsel has alleged that Neilan's discussion with Nunnery regarding his and Vicente's discipline for alleged violations of the call off policy was protected concerted activity and further that Vicente's discipline was reinstated in retaliation for Neilan's conduct. As an initial matter, I note that the discipline had been issued by Burke, the previous terminal manager. It appears that Nunnery subsequently agreed to withdraw Vicente's discipline because he initially believed it had been issued in error. Neilan then had a meeting with Nunnery. According to Nunnery's testimony and the tape recording and

[50] In this regard, the circumstances surrounding the meeting are irrelevant. It is apparent from the record that both NS and H&M wanted to minimize any ongoing conflict with the work force.

[51] As set forth in further detail above, Neilan testified that Scacco threatened to bar the men from the facility if there were problems. Gonzalez testified that if the union men gave him a hard time, he would have ways or persuading them into working better and that he could give them a couple of weeks off to think about it.

transcript entered into evidence by the General Counsel, Neilan complained that he had been "singled out" and "harassed" because he had received a letter while Vicente had not and informed Nunnery that Vicente had not, in fact, called out in a timely fashion. Nunnery then reissued the discipline to Vicente. Neilan did not offer any evidence regarding the substance of this discussion.

The General Counsel has failed to make a convincing argument that Vicente's discipline was reissued due to any advocacy on his behalf by Neilan or any other concerted protected activity in which Neilan may have engaged. Rather than acting on behalf of Vicente, Neilan was acting in his own self-interest, to Vicente's detriment. Accordingly, I recommend that this allegation of the complaint be dismissed.

Respondent Local 312 did not Violate Section 8(b)(1)(A) of the Act

Applicable Legal Standards

The basic proposition as set forth in *Vaca v. Sipes,* 386 U.S. 171 (1967), is that a union must represent all unit employees fairly, that it must administer the contract's grievance-arbitration provision fairly and in good faith, and that it violates that duty when its conduct toward a unit member is arbitrary, discriminatory or in bad faith. Unions are afforded a "wide range of reasonableness" in serving the unit that it represents, *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953), and they have discretion in determining whether grievances merit being processed. Mere negligence, poor judgment, or ineptitude on the part of the union is insufficient to establish a violation of its obligation to represent all unit employees fairly. *Local Union No. 195, Plumbers (Stone & Webster)*, 240 NLRB 504, 508 (1979). In *General Truck Drivers, Chauffeurs & Helpers Union, Local No. 692 (Great Western Unifreight System),* 209 NLRB 446, 448 (1974), the Board stated:

> It is clear that negligent action or nonaction of a union by itself will not be considered to be arbitrary, irrelevant, invidious, or unfair so as to constitute a breach of the duty of fair representation violative of the Act. Something more is required.

Under a union's duty of fair representation, while it may refuse to process a grievance or to process it in a particular manner, it is forbidden from refusing or failing to process it for an arbitrary or invidious reason or "without reason, merely at the whim of someone exercising union authority." *General Truck Drivers, Local 315 (Rhodes & Jamieson, Ltd.)*, 217 NLRB 616, 617–618 (1975); *Local 417 UAW (Falcon Industries, Inc.),* 245 NLRB 527, 534 (1980). In *Glass Bottle Blowers, Local 106 (Owens-Illinois)*, 240 NLRB 324 (1979), the Board stated:

> Where, as here, a union undertakes to process a grievance but decides to abandon the grievance short of arbitration, the finding of a violation turns not on the merit of the grievance but rather on whether the union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations." See also *Local 3036 Taxi Drivers Union (Linden Maintenance),* 280 NLRB 995, 996 (1986).

In the instant case, the General Counsel asserts that the Union's conduct was, among other things, "arbitrary," and therefore unlawful. A union's actions are considered arbitrary only if the union has acted "so far outside 'a wide range of reasonableness' as to be irrational." See *Air Line Pilots Assn., International v. O'Neill*, 499 U.S. 65, 66 (1991) (quoting *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953)). Mere negligence is not sufficient to establish arbitrary conduct. See, e.g., *Pacific Maritime Assn*., 321 NLRB 822, 823 (1996); *Office Employees Local 2*, 268 NLRB 1353, 1355 (1984), affd. sub nom. *Eichelberger v. NLRB*, 765 F.2d 851 (9th Cir. 1985).

Further, a union is not required to carry out an investigation of the same scope and rigor as one that the Region might carry out or to follow any particular procedures in processing an employee's grievance. See *Pacific Maritime Assn.*, 321 NLRB 822, 823 (1996); *Asbestos Workers Local 17*, 264 NLRB 735, 735–736 (1982); *Local Union No. 195, Plumbers,* 240 NLRB 504, 504 fn. 3 (1979), enfd. 606 F.2d 320 (5th Cir. 1979).

It has been held that a union has not breached its duty of fair representation, notwithstanding the fact that certain aspects of its conduct such as the quality of their investigation, could be subject to criticism. *Douglas Aircraft Co., a component of McDonnell Douglas Corp.,* 307 NLRB 536, 557 (1992) (union did not violate Act, although it failed to speak to some witnesses and failed to speak to charging parties before withdrawing grievance); *Laborers Local 1191 (S. J. Groves & Sons)*, 292 NLRB 1022, 1024 (1989) (although union made only a "casual" request that charging party be reinstated, and erroneously directed charging party to mail grievance to the union rather than employer, which caused grievance to be time barred, no violation found as the union's conduct was found to be mere negligence, and not arbitrary or perfunctory conduct); *Diversified Contract Services,* 292 NLRB 603, 605–606 (1989) (Board reverses ALJ, and concludes that although union failed to discuss company's position with charging party before meeting with company, failed to inform her of meetings, and did not conduct a full scale investigation, these factors did not amount to perfunctory representation, but mere mismanagement which is not arbitrary); *Local 64 Bartenders* (*HLJ Management Group*), 278 NLRB 773 (1986) (no violation found, although union at grievance meeting failed to address an issue raised by charging party, and agreed at meeting with employer's position that dismissal was for cause. The Board in footnote points out that union representative's duties in prearbitral stages, are not the same as duty owed by an attorney to a client or the duty of a union to be an advocate once in arbitration); *Rainey Security Agency*, 274 NLRB 269, 270 (1985) (the Board reverses ALJ's finding of perfunctory representation. The Board concludes that conduct relied on by ALJ, such as delay in appointing steward, failure to maintain reasonable contact with employees and to keep them informed, constituted ineptitude or mismanagement, but not arbitrary or perfunctory representation); *Local 17 Asbestos Workers (Catalytic, Inc.*), 264 NLRB 735, 736 (1982) (no violation found, although union representative agreed with employer's position without any protest); *Local 3217, Communications Workers (Southern Bell Telephone),* 243 NLRB 85, 86–87 (1979) (no violation, although charging party was never interviewed by union representatives and was

never told the status of her grievance); *Local Union No 195* (*Stone & Webster),* supra (no violation found, although ALJ found that union did not conduct an efficient investigation, and accepted employer's position); *Local 355 Teamsters (Monarch Institutional Foods*), 229 NLRB 1319, 1320–1321 (1977) (The Board reverses ALJ who found violation on grounds that union had ignored a viable provision in contract in processing grievance. The Board concludes that "duty of fair representation does not require that every possible option be exercised or that grievant's case be advocated in a perfect manner.").

Thus, based on the foregoing, it becomes apparent that arbitrary or perfunctory representation is not established merely because a union might have conducted a more thorough investigation, or failed to raise particular arguments in support of a grievance. As the Board has observed, "the issue here is not whether the [union] discharged its obligations with maximum skill and adeptness, but whether, in undertaking its efforts, it dealt fairly. The duty of fair representation does not require that every possible option be exercised or that a grievant's case be advocated in a perfect manner." *Monarch Food,* supra at 1321*; Office Furniture,* supra at 67; *Diversified Contract,* supra at 605. See also *Local 327 Teamsters (Kroger Co.),* 233 NLRB 1213, 1217 (1977) (although union official did not seize upon possible inconsistencies in witnesses' testimony, "the duty of fair representation in representing employees in grievances does not require that each case be handled with the expertise of a trial lawyer").

Analysis and Conclusions

Here, the General Counsel has argued that the Union and Domini in particular acted in a perfunctory, arbitrary and discriminatory manner by failing to adequately investigate the circumstances surrounding the discharges of the discriminatees. The General Counsel undertakes to compare and contrast Domini's conduct with the manner in which other grievances were processed and handled. In a somewhat counterintuitive vein, counsel for the General Counsel has also argued that Domini had a history of perfunctory handling of grievances of other employees in the unit which demonstrate his bad faith. I cannot agree.

The record demonstrates that throughout the autumn of 2012, Domini processed and assisted in the resolution of a number of grievances, formal and informal, presented to him by employees. As has been set forth in detail above, Domini investigated whether employees could be sent to lunch at the employer's discretion; he entered into a settlement with the Employer by which Vicente's discipline for a violation of the call out procedure was expunged; he submitted the issue of schedule changes to arbitration; he submitted the issue of overtime compensation to mediation resulting in payments to Neilan and Gonzalez; he participated in an October mediation session with the FMCS at which time, in addition to the issues referred to directly above, Neilan's warning for violating call out procedures was withdrawn and there was a settlement of the Pimentel grievance. In addition, on October 24, Domini conducted a meeting with management and employees at which time an understanding was reached regarding shift duration, lunchbreaks, early departure, and overtime pay for working through lunch. Domini contacted H&M management about problems with the condition of their toilet facilities and as a result of his intervention, the problem was promptly resolved. He participated in discussions with management about worker complaints several times a week. He attended a meeting with management after employees protested that they were told that management could keep them at work for as long as 16 hours at any given time. In my view, these actions do not demonstrate arbitrary, invidious, or perfunctory representation.

Insofar as Domini's investigation of the discharges of the discriminatees is concerned; he operated on the very limited information provided to him by Neilan. When Neilan told him that two potential witnesses had been threatened and intimidated by H&M management, Domini interviewed them. Neilan insisted that Domini obtain surveillance tapes from an entity with which he had no contractual relationship and, therefore, no authority to demand such information. Domini interviewed a number of other employees and obtained statements from H&M managerial personnel. The General Counsel makes much of the fact that Domini did not interview everyone who had been on duty on December 13 and interviewed other employees who had not worked that day. There is no evidence, however, that Neilan or any other discharged employee provided Domini with additional information which would have enabled him to more specifically tailor his investigation. And, as noted above, the fact that a union's investigation could have been more thorough or detailed is insufficient to establish a breach of the duty of representation.

And then there is the fact that none of the discharged employees cooperated in the Union's investigation of the circumstances surrounding their discharge. In this regard, the Board has long held that a grievant's failure to cooperate can form the reasoned basis of a union's decision to withdraw a grievance. See, e.g., *Teamsters Local 901 (Interstate Air Service Corp.)*, 167 NLRB 135, 140 (1967). Here, it appears that the discriminatees made no determined effort to have their grievance processed by the Union but rather turned to the Board. It further appears to me that this decision was orchestrated, and that the charge against the Union was for the purpose of preventing the presentation of the matter before an arbitrator. But that is beside the point: the major factor here is that all four discriminatees were aware of and deliberately ignored the Union's requests for information which would enable it to make an educated and informed decision as to whether their grievances had merit. The Union was then obliged to rely on the representations of H&M management and whatever information it could glean from other employees.

Based upon that information, Domini concluded that there was an insufficient basis to process the grievances further. While one may disagree with that conclusion, as the authority cited above amply demonstrates, such a disagreement is insufficient to establish a breach of the duty of fair representation.

Accordingly, I recommend dismissal of this allegation of the complaint.

CONCLUSION OF LAW

By suspending and then discharging Harry Neilan, Alex Ventre, Abraham Gonzalez, and Ernesto Martinez, H&M Inter-

national Transportation, Inc. (H&M or the Employer) has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that H&M has committed unfair labor practices within the meaning of the Act, I shall order it to cease and desist from such conduct and take certain affirmative action designed to effectuate the purposes of the Act. Having found that H&M unlawfully discharged Neilan, Ventre, Gonzalez, and Martinez, I shall order H&M to offer to these employees full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, The Respondent having discriminatorily discharged Neilan, Ventre, Gonzalez, and Martinez, shall be ordered to make each of them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, H&M must compensate Neilan, Ventre, Gonzalez, and Martinez for the adverse tax consequences, if any, of receiving a lump-sum backpay award and is ordered to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Don Chavas, LLC, d/b/a/ Tortillas Don Chavas*, 361 NLRB No. 10 (2014). Respondent will also be ordered to remove from its files any references to the unlawful discharges, and to notify Neilan, Ventre, Gonzalez, and Martinez in writing that this has been done and that those unlawful discharges will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[52]

ORDER[53]

The Respondent, H&M International Transportation, Inc., Iselin, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending and discharging or otherwise disciplining or discriminating against employees for concerted, protected or union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Harry Neilan, Alex Ventre, Abraham Gonzales, and Ernesto Martinez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Neilan, Ventre, Gonzales, and Martinez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Compensate Neilan, Ventre, Martinez, and Gonzales for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Croxton, New Jersey, copies of the attached notice marked "Appendix."[54] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the H&M's authorized representative, shall be posted by the H&M and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site and/or other electronic means, if the Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by H&M to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, H&M has gone out of business or closed the facility involved in these proceedings, H&M shall

[52] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[53] Counsel for the General Counsel requests that the order in this case should include a requirement that Neilan, Ventre, Gonzalez, and Martinez be reimbursed for search-for-work and work-related expenses, without regard to whether interim earnings are in excess of these expenses. Normally, such expenses are considered an offset to interim earnings. But the General Counsel seeks a change in existing rules regarding such expenses. This would require a change in Board law, which is solely within the province of the Board and not an administrative law judge. Therefore, I shall not include this remedial proposal in my recommended order.

[54] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 14, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Employer has taken to comply.

Dated, Washington, D.C. June 10, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge or or otherwise discriminate against employees for engaging in concerted, protected or union activities.

WE WILL NOT in any like or related matter, interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Harry Neilan, Alex Ventre, Abraham Gonzalez, and Ernesto Martinez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Neilan, Ventre, Gonzalez, and Martinez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL compensate Neilan, Ventre, Gonzalez, and Martinez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and WE WILL, within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

H&M INTERNATIONAL TRANSPORTATION, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-089596 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.